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The Sulgrave Movement

IN view of the recent visit of the American Bar Association to Sulgrave Manor, the old home of the Washingtons, the following statement as to the aims and progress of what is known as the "Sulgrave Institution" will be of interest. It is by the Director and Secretary and was printed in the souvenir program presented to the American lawyers.

"The Movement had its origin in America, where a desire had been expressed to celebrate in a fitting way the Centenary of the Treaty of Ghent and the completion of One Hundred Years of Peace (spite of many difficult and vexatious controversies) between the American and British peoples. The American Peace Centenary Committee was formed, about 1910, with Theodore Roosevelt as President and Andrew Carnegie as Chairman. In 1911 the British Peace Centenary Committee was formed, with the late Earl Grey as President. Great preparations were made on both sides for the Celebration. The story of the Hundred Years Peace, of the Rush-Bagot Agreement of 1817, and of the disarmed American-Canadian frontier, was given general currency in both countries. A British Delegation visited the United States in 1913. In January, 1914, Sulgrave Manor, the Old English Home of the Washingtons, was purchased by the British Committee, to be a centre for all time of the propaganda of British and American friendship.

"The Great War broke into our peaceful projects, depleted our ranks, and arrested for a time our operations; but, far from depressing our enthusiasm, it only served to raise it, and to give our work a greater importance and significance. The Movement had a rebirth in both countries as the Sulgrave Institution, with, in England, the co-operation of the Anglo-American Society. Ambassador Page was our first Chairman here, and took the deepest interest in our work—an interest which, to our gratification, Ambassadors Davis, Harvey, and Kellogg have continued and confirmed.

"Through one of our Members, Sir George Watson, we were privileged to found here at the end of 1919, the Watson Chair—the first chair of American history founded in this country. With Bryce, Hadley, and Butler as our first three lecturers, the success and widespread influence of this foundation is already assured. We were the first to discover, in the common springs of British and American history, a source of education and inspiration towards friendship and understanding. Sulgrave has become a mecca for the proselytes of this idea; and that there was a contagion about it, has been proved by many subsequent happenings (for some developments of which we must not be held responsible) at the graves of Pocahontas and General Oglethorpe, at the ancestral homes of the Franklins and Adamses, and elsewhere.

"In 1920 we organized the international celebration of the Tercentenary of the Pilgrim Fathers, and of the first American Legislative Assembly in Virginia. A British Delegation, headed by Lord Rathcreedan, toured America in connection with this Celebration, from Jamestown to Plymouth Rock. It stands to the credit of our Movement that it brought the majestic figure of Abraham Lincoln to Westminster—where it stands opposite the Abbey—and placed the effigy of George Washington near the dust of Nelson and Wellington in the crypt of St. Paul's cathedral. These were great symbolic acts of friendship, the influence of which has been universally acknowledged.

"In the same spirit, in 1922, a British Delegation, headed by Sir Charles Wakefield, to whose many generous acts our Movement owes so much, toured through 6,000 miles of American territory, and Sir Charles presented to the American people a fine statue of Edmund Burke, at Washington; a bust of Lord Chatham, at Pittsburgh; and busts of Lord Bryce, at

the Senate House, Washington, and in Trinity Church, New York. We take pride in these acts of international interpretation, with which the Sulgrave Movement has been honorably associated.

"Our Movement is young, as yet, and we hope to better this record as the years go on. In all our work Sulgrave had been a rallying-point and source of inspiration. We have grown to love it, and that for which it stands. We hope to make it still more beautiful and attractive. The latest news about it—and with this I close this brief record—is that an American Society of women sprung from old Colonial stock, the National Society of Colonial Dames, has recently raised $100,000 towards the sum required for a permanent Maintenance and Endowment Fund for Sulgrave Manor, to secure it for ever as a shrine of friendship, kinship, and comradeship, for the American and British peoples."

H. S. PERRIS, *Director and Secretary.*

Constitution Week Celebrated

REPORTS indicate that Constitution Week, September 14-20, was widely celebrated throughout the country this year. The daily newspapers, as a rule, editorially commended the movement and the various Bar Associations did their part by furnishing many speakers for public meetings, organization meetings, schools, etc. The program of suggestions for the celebration of the week, sent out some time ago by the Citizenship Committee of the American Bar Association, contained addresses on the following subjects: Sunday, Sept. 14—Ministers to be requested to preach sermon on the first amendment to the Constitution, using as text, "Remove not the ancient landmark which thy fathers have set." Monday—The setting and inspiration of the United States Constitution; the Magna Charta, the English Bill of Rights, the Mayflower Compact, Declaration of Independence, Articles of Confederation, etc. Tuesday—Watchwords of the Constitution: A Government of Laws and Not of Men; Liberty under the Law; Equal Opportunity to All Citizens. Wednesday—What the Bill of Rights in the Constitution has meant to the American People and What it Means Today. Thursday—The Services of John Marshall in making our Constitution the Supreme Law of the Land. Friday—Present Dangers to the Free Institutions established by the Constitution. Saturday—To uphold the Constitution in his daily life and activities is the duty of every good citizen.

An Application for Membership

CATO learned Greek at eighty, but Mr. D. W. Virgin, of Geneva, Nevada, has given perhaps an equally striking illustration of a continued and lively interest in intellectual matters, by making application for membership in the American Bar Association at the advanced age of eighty-nine years. Mr. Virgin was one of the lawyers to whom the Conference of Bar Association Delegates sent a membership application blank as an insert in the reprint of its proceedings at Minneapolis, which it distributed widely. Mr. Harley, Secretary of the Conference, recently received the following reply:

"Geneva, Nev., July 2, 1924.

"Dear Sir:

"My apology for not making my application sooner is that I mislaid the communication of the Conference at the time of receiving it, before I had read the contents of the envelope, and did not run on to it again until about three days ago. Anyhow, better late than never.

"And furthermore, I will say that my age, which will be eighty-nine years on July 4 next, and physical disabilities and other circumstances, will probably prevent me from attending the meetings of the Association or taking any active part in its operations; but I will surely do it no harm.

"I merely make these suggestions, for I don't know, and no one knows what the future has in store for them. We can only wait, hope and pray, and that is what I am going to do. Will commence now by praying that you may be able to make out my poor penmanship.

"Very sincerely yours, with best regards,

"D. W. Virgin."

Executive Committee's Mid-Winter Meeting

THE Executive Committee will hold its regular mid-winter meeting in Atlanta, beginning Jan. 7, 1925. At this meeting the place for holding the next annual meeting of the Association will be selected and the customary routine business, including appropriations for the various committees and sections, will be transacted. Various other committees will doubtless hold their meetings at the same time and place.

PROGRESS IN LAW IMPROVEMENT IN THE UNITED STATES

Attention Has Heretofore Been Devoted Principally to Formulation of Legal Doctrines, Both Substantive and Procedural, But the Time Demands the Development of Greater Facility in the Translation of Law into Effective Control of Human Action—Study of Underlying Forces Affecting Law Administration and Stimulation of Popular and Official Morale Needed*

By Hon. Harlan F. Stone
Attorney-General of the United States

HISTORY has been defined as the record of human progress. But as human progress has not always been continuous and has not always moved in a positive direction, we cannot well study history without taking into account the failures as well as the successes of mankind—both measured in terms of progress. And in discussing the progress of law improvement, we cannot well disregard our failures and our omissions, for it is by their appraisal, made in terms of the successful functioning of law in the effective control of human action, that its improvement must ultimately be measured.

At no time and at no place in history has the world seen so many agencies earnestly engaged in the enterprise of law improvement, as at the present time in these United States. There are the leading university schools of law which for a generation have been engaged in the critical analysis of our common law and equity systems. The investigations carried on by their scholars have subjected to penetrating inquiry and investigation our age-long accumulation of precedent. They have searched out the historical origins of legal doctrine. They have marked out the boundaries of the anomalies in law and sought to account for their presence there. They have made the beginnings of a classification of our law and they are taking the first steps in the necessary process of defining, with greater accuracy and precision, its concepts. In short, they have been profitably engaged in that work which is a necessary preliminary to the great task of restating the doctrines of the common law which is now engaging the attention of our profession. They are, all things considered, the most potent force today, working for the systematic and orderly improvement of our legal system by statement of its fundamental doctrines on the basis of scholarly research and the scientific investigation of legal data, and it requires no gift of prophecy to venture the prediction that we shall find both the legislative and judicial branches of our Government resorting to the scholars in our universities with increasing frequency for aid and guidance in the solution of their problems.

There are, moreover, innumerable other agencies intent upon the improvement, by one method or another, of our legal system. There are the Committees of the Houses of Congress and of our State legislatures engaged in the study of the specific types of legislative problems committed to their charge. There are the various organizations for improvement in legislative drafting; there are the Commissioners on Uniform State Laws; there is the great number of organizations for the promotion of particular social and economic reforms which direct their energies to the framing of legislation involving specific problems of law reform or law improvement. There are the Committees of Bar Associations, National, State, County and City, which are assiduously devoting themselves to various programs for the improvement of our law. There is the American Law Institute, pledged to the most difficult undertaking in the history of jurisprudence, the re-statement of the common law. All of these agencies are not only actively engaged in the study of the problems of law improvement, but the results of their investigations are finding expression in a voluminous literature which is itself a vast repository of our rapidly accumulating knowledge of these problems. Those familiar with this literature are aware that the United States now annually produces more printed pages relating to the subject of law improvement than all the rest of the world combined.

No one can for a moment question the value and importance, or indeed the necessity, of these efforts to improve the substance of our law. If it is to do its appointed work, our law must be clarified and simplified. Its anomalies must be removed. Its procedure must be reformed. Its leading doctrines must be brought into closer harmony with the social and economic forces of the times and these ends can be attained only by the persistent efforts and constant co-operation of all those agencies which, by study and investigation, by the gathering of data, by the framing of legislation, by the education of the Bar and the public, are making their contribution to the cause of law improvement.

Nor can there be any serious question but that during the past twenty-five years, very substantial progress has been made. The recommendation of the Commissioners on Uniform Laws, and the enactment in many States of Statutes prepared by them; the reforms urged by this and other Bar organizations which have been made effective; the adoption in most States of a reformed procedure, civil or criminal; the organization of the American Law Institute and the successful inauguration of its work, are substantial indications of progress and of accomplishment. Nevertheless, the worthiness of our agencies for law improvement, the success of their undertaking and the importance of their

*Address delivered at annual meeting of the American Bar Association, Philadelphia, Penn., July 8, 1924.

continuance with the active support and encouragement of the Bar, should not be permitted to obscure the fact that the development of our whole program of law improvement, in some very important respects, has been a one-sided development, leaving out of the reckoning certain essentials to the due administration of our law which are as necessary as the formulation of legal rules and doctrines. Most of us have made our first acquaintance with law as students and we continue to hold toward it the attitude we assumed as students. We study its rules and doctrines as effective rules of action, never doubting but that the one essential step to secure their execution is to know what they are. We judge the nature and character of those rules always with the assumption that they are efficacious to compel or restrain human action in accordance with the policy of the law. Similarly in legislation we are prone to enact or to refuse to enact laws on the assumption that when the legislature has spoken human action will be controlled in accordance with the provisions of the Statute and that we need not concern ourselves about any of the difficulties of their enforcement. Yet all human experience teaches us that a wide and oftentimes impassable gap lies between law as a mere statement of rules of conduct and the effective translation of those rules into the actual control of human action and that beyond all our efforts to formulate more perfect rules of law, that which is the most vital to any legal system is the union of the will and the capacity to bring about the successful bridging of that gap. For the most perfect law is not self executing. Even a crude and imperfect law, if effectively enforced, may be a more satisfactory instrumentality of justice than the ideal law which is habitually disregarded. And, in the course of history, it has been often demonstrated that the period of the most just and equitable administration of law has not always coincided with the time of the perfection of its legal formulas. Roman jurisprudence may be said to have reached its highest state of perfection as a formulation of legal doctrine in the classical period of its codification. Yet it cannot be said that it was then that Rome reached the highest point in the wise and just administration of its laws.

Any scheme for the adequate administration of the law then, necessarily involves two distinct elements, each of which is of equal importance because each is essential to the end sought. The one to which we have been principally devoting our attention relates to the formulation of legal doctrine, both substantive and procedural. In order that law may be adequately understood and conveniently applied, it must be logical and orderly in its structure; capable of accurate and precise statement and likewise capable of being ascertained with certainty and with convenient speed. All of these qualities may be attained by improvement in the structure and statement of law, and it is to this kind of law improvement which we have been principally devoted. Something in our training and experience leads us, as lawyers, always to seek to improve the law by a better formulation of it. The reason for this attitude is perhaps not far to seek. By far the greater number of members of the Bar are regularly engaged in the professional undertaking of advising private clients and seeking to secure their rights. The greatest obstacle which the lawyer encounters in that undertaking, especially in the case of the more competent members of the Bar who constitute its leadership, is the obscurity and uncertainty of the law itself when applied to new states of fact. Hence it is that that leadership has directed its attention to the type of improvement which tends to remove the obscurity of the law and increases its certainty. This remedy is one in which the legal mind takes a peculiar satisfaction since it involves the analysis of the technique of the law in which the lawyer is especially trained, and the classification and statement of its substances by re-statement or by legislation.

But, as I have already suggested, these new formulas are not self-executing. The reforms which they embody will never be real or effective improvements in our legal system without the aid and support of a developed facility in the translation of legal formulas—law at rest—into law in action. That is to say, the facility with which the actual rules of law may be made effective in practice to control human action. In a broad sense law improvement depends quite as much upon the development of this facility as upon the improvement of our legal formulas, for it is by the effectiveness of law in action as distinguished from the static law of the student and the philosopher, that a legal system must justify itself.

There is a prevalent impression among lawyers that the lawyer's duty in securing this facility begins and ends with the improvement of our procedure. But facility in law enforcement does not depend upon procedural law alone, and in fact the technical procedure of courts has, I believe, much less influence upon the effective administration of the law than our profession is accustomed to attribute to it. Nevertheless, it is to the procedural side of the process of translating static law into law in action that we have mainly directed our attention. Here again the reason is obvious, for the remedy for a defective procedure to which the technically trained lawyer is predisposed, is a reformulation of procedural rules. Hence the one point at which we have seriously endeavored to improve the translation of static law into law in action is in its procedure. I think it may be said parenthetically, that the principal reason why our attempts at reform of procedure in this country have not been more successful is that we have approached the problem as exclusively a matter of rules for the control of Judges and lawyers rather than as a guide for an administrative procedure, whereas outside the framing of formal pleadings, legal procedure is essentially a matter of administration and good administration is a matter of the skill and spirit of the administrator rather than of the number and complexity of the rules which are imposed upon him. If one contrasts the English practice, which is, I believe, the most successful system of legal procedure in the English speaking world, with our own, it will be found that the essential point of difference between the two which may be stated in a sentence, is the emphasis placed by our system on formal rules regulating the minutiae of practice and in the subordination, in the English system, of formal rules, to a legitimate emphasis on the true character of legal procedure as an administrative system depending for its successful operation on the skill,

spirit and sympathetic understanding of its principles by the Bench and Bar.

It facility in the translation of law into effective control of human action is not a matter of rules and legal formulas, how then is that facility to be attained, and how can the Bar aid in attaining it? To answer that question finally and adequately, it will be necessary to know wherein we are lacking in that facility far more fully and accurately than we know it at present. It is a prevalent complaint that the laws are not vigorously and effectively executed; that the law renders but imperfect and dilatory justice between private suitors; that crime is on the increase; that there are a greater number of crimes committed in proportion to our population than in other civilized countries, and possibly in some that are uncivilized, and that there is a growing lack of respect for law and of our institutions for the administration of justice on the part of our citizens.

How far these charges are true cannot be definitely and finally determined for the reason that we are without any reliable and comprehensive statistics of the administration of justice in this country on which such a determination can be based. At the out-set we are without the data for the accurate appraisement of our agencies and methods of law enforcement which must precede any intelligently directed effort for their improvement and we are without the means for ascertaining definitely what progress is being made or in what direction it is proceeding. So that a first step toward improving the administration of our laws which our profession could and should encourage, is the establishment of an adequate and uniform system of gathering the statistics of the administration of justice in the United States, and for making them available to all those bodies and organizations seeking the improvement of law administration.

If, however, one judges of the matter on the basis of his impressions and observations and personal experience, he will come to the reluctant conclusion that notwithstanding the improvement, actual and potential, in our static law, the actual administration of justice in the United States is not improving and that there are multiplying evidences that it is in a period of decline which began before the World War and was greatly accelerated by it.

He will be forced to conclude also that that decline is not due either to the form of substance of our legal structure which have been steadily improving for a generation, but that it is to be attributed rather to our failure to develop that facility in translating legal rules of action into actual control of action which is the second essential element to an adequate legal system.

The traditional mode on dealing with failure in law administration, on the part of the lay public, is by hue and cry for a victim; some failure of justice; some scandal in its administration, apparently fortuitous but more often inevitable since these are but the external manifestations of an internal disorder, stir the public conscience to demand action and reform. The action demanded is the wreaking of vengeance. The reform insisted upon is that incompetent or corrupt officials must be removed and punished and new ones appointed in their stead. Once appointed, with the subsidence of public excitement and agitation, they are left to struggle on with all the forces which render their predecessors incompetent or corrupt. The lawyer's method of improvement is hardly to be preferred. The lawyer turns to the creation of new legal rules and the establishment of new legal machinery. New criminal offenses must be defined and placed on the statute books; new courts must need be established and new officials are authorized to operate an increasingly complicated legal machinery and having thus treated the symptoms without discovering the disease, we turn to other activities until again, disturbances in the processes of law enforcement stir us to a repetition, in varied form, of the old and often tried remedies.

The time has long since come when the American Bar should take a positive leadership in the movement for improvement of law administration in the United States, not merely by the creation of new legal rules and new legal machinery, but by the study of the underlying forces which affect the processes of law administration; by the stimulation of that popular and official morale which are essential to the due execution of the laws and by the curtailing of those forces which tend to break down the morale of law enforcement agencies.

By far the most important of these agencies is the Bar itself, for to it is committed the due and orderly presentation of the causes of litigants and the aid of courts in determining the rights of litigants. We can never hope to have our laws executed with that dignity, efficiency and integrity which command the popular respect and support which must lie at the foundation of every system of justice unless we have a Bar whose membership commands respect by its character and its attainment. That is a fundamental fact which this association ignored until its notable action in adopting the report of its Committee on Legal Education in 1921 when, for the first time, it committed itself unreservedly to the proposition that there should be a materially higher educational standard for admission to the Bar and that it should be made uniform in all the States.

For full a generation, especially in the larger cities of the country, we have progressively lowered the tone and standards of the Bar, through the increasing numbers of those entering the legal profession who are without the adequate technical training and experience and without the background of liberal education, experience and associations which make for moral responsibility as well as develop the capacity for performing adequately the duties of the lawyer. Today in our urban communities, there is full recognition of this fact and of all its implications. In the more thinly populated areas of our country, however, there is a reluctance to accept as true and to act upon, this obvious change in the personnel of our profession with its consequent affect on its corporate character and public standing. But the logic of events must sooner or later convince us all that the most important step in the direction of improvement of the law on its administrative side, is by improvement in the training, character and morale of those to whom its administration is primarily committed, and unless we can take that step by convincing ourselves and the public that our profession ought to be and must be in a real sense a learned profession, with a corporate sense of the dignity of its calling and a conviction of its duty to courts and the public, it is idle for us to lament the grow-

ing loss of respect for law, or to hope that in any fundamental way we will secure permanent improvement of our legal system either in the substance of its rules or in the effectiveness of their execution.

After the Bar as a whole, the problems of the due execution of the laws center upon those officials who under our system are especially charged with the duty of law enforcement. In a large measure the skill and integrity of law enforcement depend upon the functioning of those officers in the organization and conduct of their offices. Yet less is known by the public of what goes on there than of any other part of the machinery of justice, and as a profession we have done less to study and improve their functioning than we have done with respect to any other part of our system of law enforcement.

Fundamentally there is no more reason why the office of the public prosecutor should be a political office than that of a Judge of the Federal courts, and yet infinite harm is done to the cause of law enforcement and good government in this country in consequence of the fact that that office is either frankly and avowedly political or in any event is peculiarly subject to untoward political influences. This fact, coupled with our inadequate administrative system or no administrative system at all in the conduct of those offices, is probably more responsible for the lax administration of law than all other causes combined. Lack of system in the assignment of work and handling of cases; inadequate office records; lack of available records of those who are second offenders; carelessness in the preparation of cases; in the filing and recording of affidavits; absence of the methods of fixing personal responsibility which prevail in a well organized private law office; all encourage inefficiency and give latitude and opportunity for negligence and corruption. I venture the opinion that wherever there is laxity and inefficiency in law enforcement, that there these conditions will be found to prevail. With such possibilities ever present, we should not be surprised that the machinery of justice does not always work with that exactness and precision which the legal theory presupposes and that justice is evaded through delays; the *nolle prosequi;* the suspended sentence; through pleas of guilty to the lesser offence; through light or reduced sentence and the like. Nor should we be astonished that the number of crimes in proportion to the population is greater here than in those countries where law administration is further removed from political influences and conducted by a better ordered administrative system.

There is opportunity here for study of our system of law administration both in our great schools of law and of political science and by our Bar. It is not beyond the powers of our Bar to find a way to curtail political influence in law administration and to convince the public that such curtailment is worth while. It is not beyond the capacity of the Bar of a country or a city or of the American Bar Association to demonstrate publicly how the office of public prosecutor may be organized; how its records may be kept; how the public business may be carried on with dispatch and dignity and decorum so as to strengthen infinitely the average quality of the administration of public justice in this country.

There is room, too, for the study of the whole problem of the adaptability of the machinery of law enforcement to the particular law to be enforced on the one hand and on the other of the adaptability of both the law to be enforced and the machinery of enforcement to popular psychology, for it is just here that all too frequently we fail to bridge the gap between law and the enforcement of law.

Nor need this study be confined to methods of securing greater efficiency in law administration. It might well be directed to securing ways and means of setting some limits upon those administrative devices which for nearly a generation we have been introducing into our legal system and which have steadily encroached upon individual liberty of the citizen. The extension of the activities of the Government into new fields, has developed enormously the machinery of administration and brought about the adoption of new administrative devices in the supposed interest of an expeditious enforcement of law without the embarrassment of inconvenient interference by the courts. This has been brought about by conferring upon administrative officials more or less arbitrary powers, the exercise of which constantly tends to narrow the common law rights and privileges of the citizen. With this growth in Governmental activity and the consequent increase in the contacts of the Government with the private citizen, we, perhaps, cannot hope to preserve unimpaired the traditional privilege of the citizens to resort to the courts for the determination of his rights rather than to the non-judicial determination of administrative officers. But we will do well to remember that the most precious inheritance of the new world from the old is embodied in those fundamental notions of individual right and personal liberty, under law which were the product of Eighteenth Century English Liberalism and which have found here their true expression in our Bills of Rights and in the first ten amendments of our Constitution. We must not permit so noble an inheritance to be carelessly squandered in our haste to promote efficiency in our administration by the sacrifice of the liberty of the individual. The time was when our profession was the first to assert and protect the sanctity of individual liberty against the assaults of arbitrary power and when Burke truly said of it that it was ever ready "to augur misgovernment at a distance and to sniff the approach of tyranny on every tainted breeze." The bar, by virtue of its traditions, its training and its public obligations should be the zealous defender of individual liberty, the first to protest the tyranny of the abuse of power and of official position, ever ready to scrutinize and resent the enactment of laws that arbitrarily encroach upon personal liberty and eager, by study and investigation, to find the way for the accommodation of our administrative system to the vital necessity of preserving and perpetuating in our law the fundamental principles of individual liberty.

It is for the legal profession, too, as well as the publicist and the reformer to direct its attention to those phases of popular psychology which so profoundly influence the administration of law. It is a truism that the enforcement of law cannot rise above its ultimate source in popular respect for law and for the institutions for law enforcement. It is true also that justice and efficiency in law administration will on their side inspire respect and win popular support, once the nature and func-

tions of the administrative agencies of the law are understood and public confidence is established in the integrity and zeal of officials, whose duty it is to enforce the law. It is of the first importance to the improvement of our legal system, therefore, that our legal institutions and their functioning should be justly, fairly and intelligently interpreted to the people.

How can we hope to secure popular respect for law or its due administration when the rights of litigants are daily determined by trial by newspaper in advance of trial by the courts; when the public is encouraged to believe, by responsible leaders of opinion, that there exists in our polity any body or any agency, other than the duly constituted courts, which has either the authority, the capacity or appropriate facilities for determining the guilt or innocence of those charged with crime.

Journalism has as high a stake as any other interest in the legal institutions of this country, for in them freedom of the press and freedom of thought and opinion have their only safeguard. Our profession may therefore urge upon it, on grounds of interest as well as of public duty, the importance of fair, intelligent criticism of the action of courts, and of accurate and enlightened accounts to the public of the functioning of law enforcement. It may urge the abandonment of that irresponsible publicity which is prone to distort or ignore the essential facts and hamper the administration of justice through the encouragement of that ignorance and misunderstanding on the part of the public which are inimical to the fair and impartial administration of justice. The ever widening and vicious circle of the stimulation by sensational news methods of an insatiable public demand for sensational news stories is corrupting public standards and distorting popular notions of the administration of justice. Sentimental and extravagant reports of judicial proceedings, with an exaggerated featuring of their dramatic aspects and of the personality and official action of lawyers and judges are familiar procedures by which the administration of justice is discredited; the soundness of public sentiment and judgment impaired and our legal system brought into contempt which it does not merit and which weakens and obstructs the administration of justice.

Here, then, is the most promising opportunity for progress in law improvement, for it is here that we have done the least to point out the evil and the least to urge its correction.

If time permitted one might refer at length to numerous other factors which profoundly affect the process of translating law at rest into law in action. Such, for example, as specific procedural reforms; the necessity of building up through a competent civil service a permanent body of officials trained and experienced in the work of law enforcement; the need of some instrumentality for keeping the public adequately and regularly informed as to the functioning of agencies for law administration; more complete and readily available records of criminal offenders and an adequate system of gathering and preserving the statistics of the administration of justice in the entire country. But these factors, like the others to which we have referred, all relate themselves to the three great essentials to the adequate enforcement of our laws; an administrative system better ordered and more skillfully devised for spanning the gap which lies between law and the legal control of action; the creation of a more skillful and better trained personnel devoted to the daily task of law enforcement; and back of both, the motive force of a well informed, intelligent, public spirited citizenship.

It is axiomatic that a people, in the long run, will have meted out to them the kind of justice they deserve. We cannot hope that our people will prove themselves any exception to this rule. Nor is the attainment of justice a mere matter of aspiration, however worthy it may be. To attain the end desired, aspiration must be guided by intelligence founded upon experience and accurate observation. Upon our profession is placed the duty and responsibility for guilding the aspirations of our people for a wise, just and efficient administration of our laws. Let us recognize that that duty cannot be discharged alone by the philosophical perfection of legal doctrine, worthy and necessary as is that enterprise. We cannot perform that duty by the mere creation of new legal rules and the reformulation of old ones. The end sought must be achieved by a greater emphasis on the study of the problems of law administration, conceived and carried on in the spirit of public service and public leadership and with something of the statesmanship which glorified our profession in the golden days of the organization of our constitutional Government and the creation of our judiciary system.

America and Edinburgh

"If Edinburgh cannot produce a roll of names comparable to the long list of students of the Inns of Court in England who played a part in American history, she has had interesting connections with the United States. In 1754 the University of Edinburgh conferred the honorary degree of Doctor of Laws on 'Colonel Lee, Virginia,' the father of the great General Robert Lee, 'it being understood that the said Colonel Lee was to give £50 sterling to the Library.' His cousin, Arthur Lee, the Virginian Whig, was educated at Eton, and was a member both of Lincoln's Inn and of the Middle Temple. He came to Edinburgh, and graduated in medicine in 1764. 'He was an old companion of mine,' wrote Boswell, 'when he studied physic at Edinburgh.' He had differences with Franklin, who could not endure his 'very magisterial airs.' Franklin, indeed, has said that the 'disputatious turn' is a habit seldom found in people of good sense 'except lawyers, University men, and men of all sorts that have been bred at Edinborough.' Franklin himself received the freedom of Edinburgh. The number of American students at Edinburgh about the time of the Seven Years' War is remarkable. In 1765 out of 13 medical graduates 5 were American."—*The Scotsman* (Edinburgh).

The Paris Visit

We trust to print in our next issue an account of the visit of the members of the American Bar Association to Paris as guests of the Bar of that city, on July 29, 30 and 31. A well-known member of the American Bar who went over to Paris has promised to prepare the account, but it had not arrived at the time of printing this issue. Over six hundred American lawyers and their ladies—just double the number anticipated—made the visit to the French capital and greatly enjoyed and appreciated the many courtesies which they received there from their French brethren.

REVIEW OF RECENT SUPREME COURT DECISIONS

Apportionment of Joint Rates Among Carriers—Transportation of Natural Gas from State to State and Sale in Wholesale Quantities to Distributing Companies Is Interstate Commerce—Limited Partnerships—Eminent Domain Proceedings Against State Property —Inspection of Books and Papers of Federal Trade Commission — Habeas Corpus and Res Judicata—Bankruptcy Court Jurisdiction — Benefit of Composition in Bankruptcy—Equitable Liens

By Edgar Bronson Tolman

Carriers, Apportionment of Joint Rates

The annual reports filed by the carriers with the Interstate Commerce Commission are not of themselves evidence, and on a hearing to adjust rates the Commission must formally introduce such portions as it deems material.

In readjusting a division of joint rates the Commission cannot rely on the aggregate result of the movement of traffic, but must consider the individual joint rates and their division.

United States et al. v. *Abilene & Southern Ry. Co. et al.*, Adv. Ops. 593, Sup. Ct. Rep. 565.

When the Kansas City, Mexico & Orient railroad system was about to cease operation because its revenues were insufficient to pay operating expenses, the Interstate Commerce Commission undertook an investigation into its financial condition. The thirteen carriers whose lines made direct connection with the Orient were parties to the investigation. It resulted in an order reducing the share of these connecting carriers on all interchanged traffic by a fixed per cent, and increasing the share of the Orient by that amount. Before the order went into effect the thirteen carriers brought this suit in the District Court for the District of Kansas to enjoin the enforcement of the order. The court granted a perpetual injunction. On appeal, the Supreme Court considered four distinct objections of the carriers as to the validity of the order. Two of the grounds urged the court found without merit, but for the other two reasons, indicated in the above caption, the court held the order rightly restrained as void, and therefore affirmed the decree.

Mr. Justice Brandeis delivered the opinion of the Court. Before considering contentions as to the invalidity of the order he held that the lower court had not abused its discretion in denying a motion to dismiss, because plaintiffs had not waited to bring the suit until after exhausting the administrative remedy afforded by a petition for rehearing before the full Commission. The order had been issued by Division 4, consisting of four members. The learned Justice said:

> In the absence of a stay, the order of a division is operative; and the filing of an application for a rehearing does not relieve the carrier from the duty of observing an order. Despite the failure to apply for a rehearing, the court had jurisdiction to entertain this suit (citing cases). Whether it should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion. We cannot say that, in denying the motion to dismiss, the discretion was abused.

Referring to the *New England Divisions Case*, 261 U. S. 194, 201, 202, the learned Justice held there was no defect of parties by reason of the failure of the Commission to make all carriers who were parties to the through rates respondents before it. The order directly affected only the thirteen directly connecting carriers.

Further, he held that the order was not made on an improper basis. The Commission might give the weaker road a division larger than justice merely between the parties would suggest, because of the intervening interest of the public in the maintenance of an adequate transportation system. The learned Justice said:

> Relative cost of service is not the only factor to be considered in determining just divisions. The Commission must consider, also, whether a particular carrier is an originating, intermediate or delivering line; the efficiency with which the several carriers are operated; the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property; the importance to the public of the transportation service of such carriers; and other facts, if any, which would, ordinarily, without regard to mileage haul, entitle one carrier to a greater or less proportion than another of the joint rate.

Nor was he of the opinion that it was arbitrary action to confine the reduction of rate divisions to the thirteen carriers which had physical connection with the Orient:

> These connecting carriers have a demonstrable interest in having the operation of the Orient continued. Other carriers doubtless have an interest; but it is less certain. It is open to any of these thirteen carriers to institute proceedings before the Commission with a view to securing a partial distribution of their burden among other connecting carriers.

But it was held that the order was void because the finding rested partly upon facts contained in the annual reports filed with the Commission by the carriers, and these reports were not formally put in evidence. The Commission's examiner had merely served notice that it would be necessary to refer to the annual reports. The learned Justice said:

> It is sought to justify the procedure followed by the clause in Rule XIII which declares that the "Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file." But this clause does not mean that the Commission will take judicial notice of all the facts contained in such documents. Nor does it purport to relieve the Commission from introducing, by specific reference, such parts of the reports as it wishes to treat as evidence. It means that as to these items there is no occasion for the parties to serve copies. The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.

It was further objected by the carriers that the record did not contain any tariffs showing individual joint rates or their division. The Commission answered that data dealing with the traffic in the aggregate would support a finding as to the indi-

vidual rates. But the learned Justice said on this point:

> The argument is not sound. The power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divisions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis of a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust. These aggregate results should properly be taken into consideration by the Commission; but it was not proper to accept them as a substitute for typical evidence as to the individual joint rates and divisions.

The case was argued by Mr. Clifford Histed for the receiver of the Orient, by Mr. J. Carter Fort for the Interstate Commerce Commission, and by Messrs. T. J. Norton and M. G. Roberts for the connecting carriers.

Interstate Commerce

The transportation of natural gas from one state to another and its sale in wholesale quantities to distributing companies for re-sale to local consumers is interstate commerce free from state interference.

Missouri ex rel. Barrett v. *Kansas Natural Gas Co.*, Adv. Ops. 585, Sup. Ct. Rep. 544.

The Kansas Natural Gas Company was engaged in producing gas in Oklahoma and Kansas, transporting it by means of pipe lines from Oklahoma into Kansas and from Kansas into Missouri, and in each State selling it in wholesale quantities to distributing companies that in turn sold it to local consumers. The company proceeded to raise its rates without the authority of the public utility commissions of Missouri and Kansas. Three suits resulted, in which these States sought to prevent the increase. Two of them were brought in Federal courts, both of which concluded that the transportation involved was interstate commerce free from state interference, and which therefore denied the relief. Their action was, on appeal, affirmed by the Supreme Court of the United States. The third consolidated case, wherein the decree was reversed, came by writ of error from the Supreme Court of Kansas which had conceded that the business was subject to Federal control, but had held that in the absence of congressional regulation, it was within the regulating power of the State.

Mr. Justice Sutherland delivered the opinion of the Court. After referring to the familiar distinction between incidental restraint effected by State regulation in the absence of congressional interference, and direct burdens restrained by the commerce clause of its own force, he considered the present case and said:

> The sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the State and before it had become a part of the general mass of property therein.

Distinguishing cases cited wherein the gas was sold directly to consumers, he said:

> The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for re-sale to consumers in numerous cities and communities in different States. The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national, admitting of and requiring uniformity of legislation.

The case was argued by Mr. Frank E. Atwood for the State of Missouri, by Mr. J. W. Dana for the Kansas City Gas Company, by Mr. Richard D. Garver for the Kansas Natural Gas Company, and by Mr. Fred S. Jackson for the State of Kansas ex rel. A. E. Helm, attorney for the Public Utilities Commission of the State of Kansas.

Partnerships—Limited Partnerships

Under the recent Illinois partnership acts persons who act as and erroneously believe themselves to be limited partners are not liable to creditors as general partners.

Giles et al. v. *Vette et al.*, Adv. Ops. 181, Sup. Ct. Rep. 157.

The limited space permitted this review does not allow of the presentation of sufficient of the facts in this case to make the question for decision entirely clear, and reference must be made to the statement by Mr. Justice Butler or to the full account contained in the opinion of the Circuit Court of Appeals (281 Fed. 928). Marcuse had been a member, and Morris had been an employee, of a bankrupt brokerage firm. Desiring to carry on the business of this firm, Marcuse and Morris undertook to organize a general partnership, with six other individuals as limited partners. This plan, which included a trust agreement whereby Marcuse was to issue trust certificates to pay off the debts of the old firm, was not consummated because it was learned that the New York Stock Exchange would not admit to membership firms having more than two limited partners. Instead, a partnership was formed wherein Marcuse and Morris were general partners, and Hecht and Finn were limited partners. As a part of the arrangement Hecht and Finn executed a trust agreement by which trust certificates were issued to them and to the other four persons interested, who each contributed cash, and by which a trust company was to receive the share of Hecht and Finn in the profits of the partnership and to distribute it to the certificate holders. This partnership was formed under the Illinois Limited Partnership Act of 1874. This act provided that no limited partnership should be deemed to have been formed until the certificate should be filed in the office of the county clerk. The certificate of the formation of the Marcuse and Company partnership was filed July 2, 1917, and on this day the partnership began to do business. But on the previous day the 1874 act had been repealed and the Uniform Limited Partnership Act substituted. This act does not allow limited partnerships for brokerage businesses, and no attempt was made to organize under it. On March 11, 1920, petitions in bankruptcy were filed against Marcuse and Company and a receiver appointed. In accordance with Section 11 of the Uniform Limited Partnership Act, Hecht and Finn renounced their interest in the profits of the business and returned all dividends paid on the capital contributed by the certificate holders.

The question was thus presented as to the status of Hecht and Finn and of the four other cer-

tificate holders in view of these facts, the new Limited Partnership Act, and the Uniform (General) Partnership Act which took effect the same day. The Circuit Court of Appeals for the Seventh Circuit held that only Marcuse and Morris were general partners, and on writ of certiorari the Supreme Court affirmed the decree of the Court of Appeals.

Mr. Justice Butler delivered the opinion of the Court. By the law of Illinois the question of partnership as between the parties is one of intention to be gathered from the facts and circumstances. Here, said the learned Justice, Hecht and Finn had no authority to act for the co-partnership and their mere right to share in the profits was not enough to indicate an intent of Hecht and Finn to become general partners. The learned Justice then said:

> As to third parties, they cannot be held liable as general partners.
>
> Section 16 of the Uniform (General) Partnership Act provides that: "When a person . . . represents himself, or consents to another representing him to any one, as a partner in an existing partnership . . . he is liable to any such person . . . who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable . . ." There was no such representation of Hecht or Finn to any person or to the public. On the contrary, they were published to the world as limited partners. It is true that they were not. But no person could have been misled to his disadvantage by the statement that they were. Representation on mistaken belief that they were limited partners was not a holding out as general partners. The lack of power of a limited partnership created under the later act to carry on a brokerage business gives no additional significance to the representations. The firm was not held out as having been organized under that act. The failure to complete the organization did not injure any persons dealing with the firm. Creditors are as well off as if the limited partnership had been perfected. The $190,000 handed over by Hecht and Finn was not withdrawn. Hecht and Finn did not intend or agree to become general partners. The things intended and done do not constitute a partnership.

Moreover, he was of the opinion that Hecht and Finn were entitled to the benefit of Section 11 of the Uniform Limited Partnership Act, which provides that persons are not general partners if they promptly renounce their interest in the business. He said:

> Section 11 is broad and highly remedial. The existence of a partnership—limited or general—is not essential in order that it shall apply. The language is comprehensive and covers all cases where one has contributed to the capital of a business conducted by a partnership or person erroneously believing that he is a limited partner. It ought to be construed liberally, and with appropriate regard for the legislative purposes to relieve from the strictness of the earlier statutes and decisions (citing cases). Its application should not be restricted to cases where there was an attempt to organize a limited partnership under that act.

Finally, the learned Justice held that from the conclusion that Hecht and Finn were not liable as general partners it necessarily followed that the other respondents, the four other certificate holders could not be held liable as such.

The case was argued by Messrs. William Burry and Guy M. Peters for the creditors and by Messrs. George T. Buckingham and Horace Kent Tenney for the supposed partners.

States—Eminent Domain

Land acquired in one State by another for a railroad yard is held in a private capacity; as to that property the State cannot claim sovereign immunity, and the land is subject to condemnation like that of a private individual.

State of Georgia v. *City of Chattanooga*, Adv. Ops. 399, Sup. Ct. Rep. 369.

The original jurisdiction of the Supreme Court was here invoked by the State of Georgia in a suit against the city of Chattanooga. Georgia had built a railroad from Atlanta to Chattanooga, and in addition to the right of way within Tennessee, had acquired land in Chattanooga for a terminal station and railroad yards. Through these yards the city now proposed to extend a street, and therefore had begun condemnation proceedings. In this bill Georgia asked that Chattanooga be restrained from appropriating its land, claiming that the city had not been authorized to condemn land already devoted to a public use, and that Georgia had never consented to be sued in the courts of Tennessee. The Supreme Court granted a motion to dismiss the bill.

Mr. Justice Butler delivered the opinion of the Court. He said first:

> The power of Tennessee, or of Chattanooga as its grantee, to take land for a street is not impaired by the fact that a sister State owns the land for railroad purposes. Having acquired land in another State for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation. The terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amount to consent that Georgia may be made a party to condemnation proceedings. . . . Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning State does not restrict or modify the power of eminent domain of the State wherein the land is situated (citing cases). Tennessee by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga did not surrender any of its territory or give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity (citing cases). Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia.

He adduced Tennessee decisions which supported the contention that Georgia had consented to be sued in the courts of Tennessee in respect of its railroad property in that state; but however that might be the learned Justice was of the opinion that the Tennessee court had jurisdiction in the matter of condemnation:

> Notice was given to Georgia as a non-resident by publication. Having divested itself of its sovereign character, and having taken on the character of those engaged in the railroad business in Tennessee (citing case), its property there is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. The power of the city to condemn does not depend upon the consent or suability of the owner. Moreover, the acceptance by Georgia of the permission given it to acquire the railroad land in Tennessee is inconsistent with an assertion of its own sovereign privileges in respect of that land and precludes a claim that it is not subject to taking for the use of the public, and amounts to a consent that it may be condemned as may like property of others.

Finally, he held that the bill should be dismissed for want of equity because Georgia could make the defense here offered in the condemnation proceedings, and thus had a plain, adequate and complete remedy at law.

The case was argued by Mr. Sam E. Whitaker

for Chattanooga and by Messrs. George M. Napier and William L. Frierson for Georgia.

Federal Trade Commission—Inspection of Books and Papers

The Federal Trade Commission may not require the production of papers of corporations against which it is proceeding without showing some ground for supposing that the documents contain evidence.

Federal Trade Commission v. *American Tobacco Co.*, Adv. Ops. 382, Sup. Ct. Rep.—

Section 9 of the Act of September 26, 1914, c. 311, 38 Stat. 717, 722, gives the Federal Trade Commission the right at all reasonable times to examine and copy any documentary evidence of any corporation being investigated or proceeded against, and empowers the Commission to invoke the aid of the District Court to compel production of such evidence. The Commission was directed by a Senate resolution to investigate the tobacco situation as to domestic and export trade, with particular reference to market price to producers, etc. The Commission filed petitions for writs of mandamus to compel the defendant corporations to produce their records and correspondence. The petitions were denied by the District Court for the Southern District of New York, and its judgments were, on writ of error, affirmed by the Supreme Court.

Mr. Justice Holmes delivered the opinion of the Court. The Senate resolution, he pointed out, was not based on any alleged violation of the Anti-trust acts, within the requirement of the Act. The learned Justice said in part:

> The Commission claims an unlimited right of access to the respondents' papers with reference to the possible existence of practices in violation of Section 5.
>
> The mere facts of carrying on a commerce not confined within State lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be (citing case). Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (citing case), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrevelant, in the hope that something will turn up. . .
>
> The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it.

The cases were argued by Special Assistant to the Attorney General James A. Fowler for the Commission, by Mr. Junius Parker for the American Tobacco Company, and by Mr. William D. Guthrie for P. Lorillard Company, Inc.

Criminal Law—Habeas Corpus, Venue

In the federal courts the doctrine of res judicata does not apply to a refusal to discharge a prisoner on habeas corpus; but on consideration of a second petition weight is to be given to a prior refusal to discharge.

Under Section 215, Criminal Code, one may be tried for using the mails to defraud in the district where the letter was delivered.

B. I. Salinger, Jr., v. Loisel, Adv. Ops. 605, Sup. Ct. Rep. 519.

B. I. Salinger, Jr., was indicted in South Dakota for using the mails to defraud. The offense was alleged to have been committed in the southern division of the South Dakota federal District. The court to which the indictment was returned was sitting in the western division, but the grand jury had been authorized to make due presentment of offenses committed in any division. The court remitted the indictment to the southern division for trial, and a warrant was issued for Salinger's arrest. Then followed a long course of conduct whereby Salinger endeavored to avoid standing trial. After being arrested, giving bond to appear, and then jumping this bond, first in Iowa and then in New York, Salinger was again taken into custody in New Orleans. Here he sued out two writs of habeas corpus. Both were discharged, and Salinger prayed direct appeals to the Supreme Court. The court directed that the appeal should operate as supersedeas on Salinger's giving bail. Nevertheless, the marshal again took Salinger into custody under the same warrant of removal, or rather under a third copy of it, for it had been issued in triplicate. A third habeas corpus writ was discharged, and the action of the Circuit Court of Appeals in affirming the decision was reversed by the Supreme Court, to which this third case likewise came, because there was but one proceeding for removal, the three warrants were in substance one, and the supersedeas stayed its execution. But the principal part of the Court's opinion has to do with the other two habeas corpus cases. With regard to these the Court affirmed the judgments discharging the writs, and directed that Salinger surrender himself into custody for removal under the warrant theretofore issued.

Mr. Justice Van Devanter delivered the opinion of the Court. The Marshal contended that the doctrine of res judicata should be applied because in the earlier New York proceeding, in which Salinger had petitioned for habeas corpus, the right to arrest and remove Salinger was questioned on the same grounds as here, and had there been upheld. The learned Justic said:

> We are unable to go so far. At common law the doctrine of res judicata did not extend to a decision on habeas corpus refusing to discharge the prisoner. The state courts generally have accepted that rule where not modified by statute; the lower federal courts usually have given effect to it; and this Court has conformed to it and thereby sanctioned it, although announcing no express decision on the point. . .
>
> But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. . .
>
> The federal statute (sec. 761, Rev. Stat.) does not lay down any specific rule on the subject, but directs the court "to dispose of the party as law and justice may require." A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application.

Passing to objections urged against removal, he rejected the contention that Salinger could not be tried in South Dakota, where the letter was received, but only in Iowa, where it was mailed. The old statute merely made it an offense to mail a fraudulent letter, but Section 215 included the

clause "or shall knowingly cause to be delivered by mail according to the directions thereon." Salinger contended that the introduction of this clause was not of significance here. But the learned Justice said:

> That clause plainly provides for the punishment of the deviser of the scheme or artifice where he causes a letter in futherance of it to be delivered by the mail according to the direction on the letter. This is done by way of enlarging original definition of the offense, the clause dealing with the placing of such a letter in a mail depositary being retained. Evidently Congress intended to make the statute more effective and to that end to change it so that where the letter is delivered according to the direction, such wrongful use of the mail may be dealt with in the district of the delivery as well as in that of the deposit. A letter may be mailed without being delivered, but if it be delivered according to the address, the person who causes the mailing causes the delivery. Not only so, but the place at which he causes the delivery is the place at which it is brought about in regular course by the agency which he uses for that purpose.

He likewise held that under Section 53 of the Judicial Code, requiring prosecution of crimes or offenses to be had within the division where the same were committed, the finding and return to the indictment are not required to be within that district, the word "prosecution" comprehending only the proceedings had after the indictment is returned.

The case was argued by Mr. B. I. Salinger for Salinger, Jr., and by Special Assistant to the Attorney General Alfred A. Wheat for the federal authorities.

In *Wong Doo v. United States*, Adv. Ops. 611, Sup. Ct. Rep. 524, an alien ordered deported presented a petition for habeas corpus, relying on two grounds. He offered no evidence in support of the second ground. The petition was dismissed. He then presented a second petition, relying wholly on the second ground. The District Court ruled that the doctrine of res judicata applied and dismissed the petition. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment. The Supreme Court held that the result was right for the wrong reason and affirmed the judgment. Mr. Justice Van Devanter said, referring to Salinger v. Loisel (supra):

> It therefore must be held that in this case the courts below erred in applying the inflexible doctrine of res judicata. But it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to a prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it on the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus.

The case was argued by Messrs. William J. Dawley and Jackson H. Ralston for Wong Doo, and by Mr. George Ross Hull for the United States.

Bankruptcy—Jurisdiction

The bankruptcy court has not jurisdiction to adjudicate by summary proceedings controverted rights as to property not in the possession of the trustee.

Taubel-Scott-Kitzmiller Co., Inc. v. Fox et al., Adv. Ops. 415, Sup. Ct. Rep. 396.

A creditor of the Cowen Hosiery Company recovered a judgment against the company, and execution was levied on personal property of the defendant. The sheriff took and retained possession. Within four months after the levy, the Cowen Company filed a voluntary petition in bankruptcy and was adjudged a bankrupt. Its trustees sought by summary proceedings before the referee to have the lien created by the levy declared void, under subdivision (f) of section 67 of the Bankruptcy Act. The judgment creditor then asked the District Court to stay the proceedings before the referee, contending that he did not have jurisdiction because neither the bankrupt nor his trustees had possession of the property. The District Court sustained the contention and granted the relief asked. The Circuit Court of Appeals for the Second Circuit reversed the judgment, but, on writ of certiorari, its judgment was in turn reversed by the Supreme Court.

Mr. Justice Brandeis delivered the opinion of the Court. He concluded that Congress had not conferred upon the bankruptcy court, in cases such as this, jurisdiction to adjudicate the controverted rights by summary proceedings. Congress, he said, might accomplish this by conferring jurisdiction over the person in whose possession the property is. The learned Justice examined the various subdivisions of section 67, and from this examination concluded:

> Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision (e) of section 67, under subdivision (b) of section 60 and under subdivision (e) of section 70. But in no case where it lacked possession, could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim.

The trustees contended that because subdivision (f) expressly empowers the bankruptcy court to order that a lien void as against the trustee shall be preserved for the benefit of the estate, the court was given, by implication, jurisdiction to determine whether the lien is void. The learned Justice said:

> The argument proceeds upon a misapprehension of the nature and purpose of the clause in question. It does not confer jurisdiction. It confers substantive and adjective rights, effected by means of subrogation, is a grant of property interests which the bankrupt did not own at the time of filing the petition. Thus, an execution lien upon property, owned by the debtor at the time of the levy and good as against a subsequent purchaser but void as against the trustee under (f), may be preserved for the benefit of the estate. If the lien were not so preserved, the benefit resulting from nullifying it would enure to the purchaser. Subrogation is the process by which this substantive right is made available. Where the bankrupt remained owner of the property until the commencement of the bankruptcy proceedings and the void lien remained the only encumbrance on the property, there is no need of preserving it. But in such case it may be desirable to invoke the strictly adjective powers conferred by the clause, and to apply for an order that a release or conveyance be made so as to remove a cloud upon the title. . .
>
> In this case, the sheriff had, before the filing of the petition in bankruptcy, taken exclusive possession and control of the property; and he had retained such possession and control after adjudication and the appointment of the trustees. The bankruptcy court, therefore, did not have actual possession of the res. The adverse claim of the judgment creditor was a substantial one. The bankruptcy court, therefore, did not have constructive possession of the res. Neither the judgment creditor, nor the sheriff, had become a party to the bankruptcy proceedings. There was no consent to the adjudication by the bankruptcy court of the adverse claim.
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> The objection to the jurisdiction was seasonably made and was insisted upon throughout. The bankruptcy court,

(Continued on page 682)

THE NEW ERA OF INTERNATIONAL GOVERNMENT

The Bases of the International Government of the Old Era and the Era Immediately Preceding the World Upheaval Are Now Ignored or Repudiated, and the New Era Is Being Dominated by Considerations of Price and Profit—Movements in Europe Today—A Policy for America*

By Hon. James Hamilton Lewis
Former U. S. Senator, Member Chicago (Ill.) Bar

ADDRESSES of the nature as is the custom here, can serve only as a suggestion. No man should impose on you the endurance necessary to a complete development of a political thesis or policy. I accept the limitation—I serve you the essence of an idea—and "if upon ye dwell a single recollection or upon ye dwell but a thought —I am content."

When I assumed to present you the observations on the theme of my assigned subject, I could not have visioned all the innovations that multiply in the new era of international government. The greater only can I essay—and in this I must pray of you, as speaks the sponsor of "King Henry:"

> "Pardon, gentles all,
> The flat-upraised spirit
> That hath dared
> Bring forth so great an object
> On so unworthy a scaffold."

To the subject: "The New Era of International Government."

The ancient prophet beholding the philosopher moving from the gates of the Sacred City, demanded: "Whither goest thou, and to what end?" To which came the reply: "I go to measure a new Jerusalem."

The old era of international government rested on the basis of Rights of Nature. The intermediate era, preceding the world upheaval, was founded on declared Duty of People. Today both of the postulates of the yesterdays are ignored or repudiated. They give over their once historic station to the call of Price and Profit.

From the military balance of power sustained by force of alliance, we now have the balance of Commercial Supremacy enforced through the bloc of international commercial alliance. This new adventure is the birth of necessities. It springs from the wish for, or the need of, National Wealth, rather than that of Military Multiplication zealous for conquest of territory. It recalls to us that in Greece, Cimon, the General, after beating the Phoenicians, in order to get out of debt, sold his sister Elphina to Callias, and, as good measure, threw in his wife. We hear the cup-bearer around Homer declare:

> "Whate'er there be of Wisdom and Mystery in the new fate,
> The gods call out 'On Guard!—lest ye be enchained
> Where the tide swallows the shore."

We in America, since our existence in the family of Nations, have ever given homage to that system of International Government based on laws defining Rights as drawn from the Commandments of God and the prescriptions of Christian governments.

So, too, was this after the Roman Conquest, the avowed doctrine of those lands from which we draw our lessons of government, or with whom we held convention or alliance as fellows in purpose and aspiration.

We Americans concur with Pascal, that International Government should be one of Justice—but that "Justice without force is powerless; with force is tyranny." Lansing in his "Treatise on Sovereignty" and Hughes in his Declaration on The Monroe Doctrine, affirm this creed as our American conviction.

Andrew Weiss, for France and Switzerland, asserts that the new International Government commands that "We must substitute victorious realities of united force, commercial or judicial, to supplant the disappearing illusions of abstracts called 'International Laws.'"

The Italian, Ferrero, in his "Averting Barbarism," writing for Europe, says: "The policy of equilibrium can only be achieved among powers great and small, with the smaller destined as satellites to the greater; or, there must be an alliance of the people of the European sphere based after something of a United States of Europe: and these," says the historian, "resting only on an economic arrangement *assuring exclusive privileges to its members.*"

Here we are met in America by the anticipation of this realization in the utterances of former United States Secretary of State Root and in the confirmatory expression of ex-President Wilson. These prophesied that a new era would trade Rights of People for Trade of Countries. The anticipation of these home statesmen was on the yesterdays put in words by the present Russian Premier, saying of Russia's new era: "We must make our international reconstruction to rebound to our commercial reward, or it will work to our financial destruction." Says this Russian spokesman: "We must be in the business of making others do business for us."

This philosophy forces us to recall the complaint of our American General, Pershing, to the innkeeper in one of the towns of France, when he inquired: "Why is your town paved with such sharp flint?" "Ah," replied the hotel-keeper, "what else can you expect, Monsieur General:—our Mayor is a shoemaker."

We do not here condemn as we analyze—we recognize the spirit of the scriptural pronounce-

*Address delivered at annual meeting of American Bar Association, Philadelphia, Penn., July 9, 1924.

ment: "He who will not care for his own house is a heathen."

For the moment we descend to the detail adopted by the Nations as their new standard of international government.

England

We turn to our near neighbor, England. After years of suffering through immeasurable loss of trade and the bearing of unsupportable burdens of taxation—the floundering of her State in cross-currents of political rapids—it was the policy of self-preservation that England should avail of the new order of international government, that she may be a beneficiary of the profitable policies in the transmutation. From treaties with Italy, Spain, Germany and Russia—based on intermutuality of rights measured by the long acknowledged Law among Nations to conserve rights of property and personal liberty—England now agrees with Spain to support her in Morocco and the Near East, in consideration of a preference trade-compact as against rivals and competitors. Then, in a spirit of magnanimity, contracts with Germany, under the Rapallo Treaty, a trade-compact superseding the Peace Treaty of Versailles. This new compact is established on the basis of commercial privileges. For these from Germany, England agrees to use all benign efforts to avoid the hardship imposed by France in the Ruhr, and that of Belgium, Italy and France in the matter of the Reparations. Seeing the new spirit of trust and faithfulness that this course infused in Germany—England, in opposition to the position she took as to Russia at Genoa and Lausanne, now concedes as to Russia the relinquishment of the pre-war loans and war-indebtedness due by Russia. England supplements in their stead the agreement of Russia to make England a preferential customer in trade and the beneficiary of concessions of value. For these England plights her honor to enforce all the protection and guarantees, that former treaties of mutual defence through armies and navies, heretofore provided as between Russia and France, and France and England.

When it is recalled that this is the Russia England beat back when Russia threatened appropriation of Turkey, *one can well see that the next move, based on mutual prospects of commerce, will be an alliance between England and France. Then England will control the Central Commercial Continent of Europe, resting on the new international era of a guaranty of peace for the assurance of profit.*

At this time we see a distinguished Lord High Chancellor—Haldane—advising England to yield to the twelve-mile limit of our Prohibition Law search and seizure in the United States, and slyly observes that our new treaties apply the three-mile limit to the four other large commercial countries of Europe, and permit an hour's run to the ships of Norway and Sweden—yet accepting the discrimination of a twelve-mile limit by us as against England. His Lordship concludes: "The more England gets the United States at sea, the more will be the illegal seizures by the United States." "From this," says he, "England may get in damages enough to charge off all her American War-Debt."

In this hope we must reply to his Lordship in the words of the entry of the English Clerk, in 1761—this clerk noting the filling of the vacancies in the Bench (as reported in Rex vs. Turlington, 2 Burr. 1761) reciting: "We are pleased now to say that his Majesty's judges are now full again."

Yet we delight to affirm that it is an inspiration to America to see her motherland of Law giving example to the world, that Nations are to be swayed more by bread and peace, than by Hunger and War. With Swinburne, we exclaim:

> "From days laid waste—across disastrous years,
> From hopes cut down—across a world of fears;
> We gaze with eyes—too fixed for tears
> And stand where Faith abides."

France

Here we salute the new compacts of regenerated France. The treaties of armies for arms, and arms in exchange for armies, have been supplanted by the Tricolor fluttering over the commerce of Czecho-Slovakia, Roumania and Poland. These lands are compacted to purchase the bodily needs and trade demands from France. In return for profits to France—enjoyed from the exclusive grant of these nations—military protection is assured and war materials for defence are guaranteed by France. To these is now added the Treaty by France with Russia and Roumania, that gives to France privileges of financing these lands when England can be supplemented or be substituted. In the same time Turkey is locked by France in a new bond with Russia—and the "call of the muezzin" to Allah merges with the brazen tocsin of the Kremlin, in the proclamation that assures to France the first place with Turkey—the second with Russia. Then Roumania and Poland acknowledge first allegiance to France as against the world.

This consummation now gives the Near East of Europe to the guidance of France, and to France the exclusive commerce from the far Eastern border of Europe to the European sphere controlled by the compacts with England. All doctrines of international government previously obtaining as policy are now translated into obligation—in consideration of the new guaranties of commerce, finance and profit.

From the aristocracy of Conquest to the democracy of Commerce, has ascended France, saying with Rohan:—"I disdain to be a Duke—I am a Rohan. I'll owe no title to favor—I favor others by my title."

These new international adjustments mean that in a gentle space of time the interests of mutual prosperity of people—instead of military power of nations—*will bring these two historic mothers of modern civilization—England and France—to one compact of friendship*, and mold them into one insuperable force of Justice, as it creates them the invincible envoy of Peace for the European Continent.

> "And those who late met in internecine shock,
> Now in well beseeming ranks
> Shall march all one way."

Italy

Here confronts us the land of the Roman—the Italy of Garibaldi, Mazzini, Mussolini and the Vatican. The home of art and the abode of beauty salutes in surrender to the same material conqueror to which other Nations have been subsidized. The paean now is:

> "Against the New Order we have nothing to say,
> Though it may be,—We have no bananas to-day."

She again urges her doctrine of Florence—the

working partnership of Art and Progress—Dictus ob hec lenire tigres.

Whatever were the necessities of the past that enforced the military rule as expressed in the compacts of Italy, which for a century had been her relation with France and Spain, then with England and Austria, and now as applied to Russia and Turkey—we note the new adjustments. While I was serving in an inconsequential post at Genoa and at Lausanne, I was forced to comment, and here certify, that it was Italy, who, first of Nations, saw the commercial opportunity through friendship with Russia. Then the classic land of the South arranged to have its products of soft lusciousness exchanged to Russia for the grain of her widening fields, that bread might be bestowed upon Italy. These contracts carried in behalf of Russia the suggestion that Italy would be her friend as against any foe moving toward Turkey or Asia. Italy under Mussolini pronounced the hour as one not of dreams but of profit; and substituted the guarantee of previous military policy, based on international law, to one resting on commercial contribution.

All this demonstrated to us that in the land where Caesar marched, Raphael wrought and Garibaldi sacrificed, the new era of international government entrenched itself where peace, under the chancel of St. Peter's, could beckon riches of trade and commerce of mart, to supplant the threat of siege or the bombardment of battleship.

Italy, from the heights of snow-glistening Alps to the blue rippling Mediterranean, showers upon us the beams of her new light of international government, singing with Petrarch, beneath the palms:

"Wine for bread,
Oil for meat;
Garlands on the head,
Friendship at our feet."

Germany

We turn ear to Germany, and hearken to her new call. She who yet cries out in the words of Isaiah, "Comfort ye, comfort ye, my people! and cry unto them that their warfare is accomplished; that their iniquity is pardoned; that their land has received at Jehovah's hand double for all her sins."

Germany, with the science of Mechanics and Maritime Achievement, clambered the fire-charred hills and descended into the war-blackened vales, seeking the flower of rejuvenation to refresh her prostrate people. Rattaneau of the Wirth Government, succeeded by Ebert of the People's Government, gives over the flame-shrivelled codes of Neitzsche and Ludendorf and in their place Germany has counselled with the spirit of the United States and learned that "friendship and brotherhood are based on universal good." Germany forsakes the fury of the Reichstag, enters into an international Treaty with Russia, and manipulates that Russia shall extend the compact to Japan, incorporate Corea and the States of Siberia. All these are summoned to adjust themselves to the new era of international government after the example of that set by England with Russia; Germany then writes her new Treaties of international government in the figures of tonnage and mechanics. Germany, under Marx, clasps in her left hand her war allies, Austria and Bulgaria, and whispers hope. She smiles on Turkey and ascends in her carriages of air and wave, and flutters her ensigns to the East; with her right hand Germany binds the new continent of trade with an international tie of governmental law that promises fruits of invention and ingenuity to all fields of mechanical use or needs of finance, in exchange for a guaranty of exclusive markets to her products; and with this convention supersedes all previous engagements of force or power. Germany finds that to place a sphere under obligations for a source of supply necessary to existence, is to guarantee that sphere Peace, and to assure it Prosperity, as she announces with her philosopher Goethe:

"Wouldst thou give freedom to many?—
First dare to do service to many;
'Tis faith and service that secure individual life."

Germany speaks through her new voice, "I seek a new day—I wish to do right to men—Give me the hand of Justice—Let me be of those who are accorded legal rights." We unite with her in the call for Justice. In the words of Sir James McIntosh, "Give me civil justice, my Lords, and I'll drive every tyrant from the realm. Deny it, and the pettiest despot can overthrow the liberties of the land."

We recall to Germany and her people the song of Tennyson:

"This is the truth the poet sings—
To one sad note in diverse tones;
That men may rise on stepping-stones
Of their dead selves
To higher things."

Russia

Shall we ask, "What is that cloud darkening the Globe of Life?" Hear Tolstoi reply: "It is the swaggering Bear, that clutches the vitals of liberty; drags them from the bleeding body of the torn and prostrate victim, and casts his shell to the wolves."

Russia, the monstrous!—the murderous!—the majestic!—She whose people after enduring generations of life-torturing infliction, fulfilled the prophecy of Byron, saying:

"Time at last sets all things even,
If we do but watch the hour,
There never yet was human power
Which could evade, if unforgiven,
The patient search and vigil long
Of him who treasures up a wrong."

Yet it is of this Russia we can hear wailing the sacred damnation:

"Behold! the Lord Jehovah of Hosts
Will lop the boughs with terror.
For the Lord hath given commandment concerning thee
That no more of thy name shall be sown."

This Russia, in resentment to the United States for refusing recognition to her Soviet Government and cutting her from the immigration lists, denies passports to Americans, and withholds commercial privileges of exploration to American prospectors. Russia assembles China and Japan with the appeal: "Are we not brothers in the East?—and united in grief from a common wrong? Why should we be divided?" Russia conjoins all China, Japan and Japan's seven Island Governments of the Pacific; and conjuring in partnership Siberia—by assurances of new governmental privileges to her States—Russia allies a population of two hundred million—at center the Cossack, East and West the trans-Siberian and Tartar.

These new lands of new adventure in Republican Government have combined themselves in a pact heralding that "privileges of Government shall

go only to those who give privileges of commerce." And they proclaim, "All favors denied those who give favors to those who do not extend favors to us."

Russia, in solemn session, unsheathing the Kris—and uncoiling the Knout—resolves that the policy of the United States, in excluding the Asiatic, is an affront to Eastern Civilization, and demands that it be rebuked by Russia as Director of the New Asia. Russia demands that all who do not recognize the Soviet Government and at the same moment do not concede every privilege to Asia that is granted any lands of Europe—be denied the privileges of the territory of Asia. That this policy will soon be the public announcement of a combined East—any reflection upon current events will convince us.

Here I summon us all to pause and reflect on our insecure situation as to aid or friendship from any of the late Allies of the United States in Europe. Remember that this new Asia has frightened France and England from offering any aid to the United States in any conflict between our land and Asia. This by the threat of taking all of Indo-China and Cochin-China and Siam and the French Islands of the Pacific from France—and to re-take Shanghai, Hong-Kong and the Hankow spheres from England. This is the meaning of the cry: "Asia for the Asiatics."

The new premier of France denounces the Asiatic exclusion policy of the United States. This is his bid for friendship of the Asiatic lands. This revealed aspect of New Asia towards Europe discloses the motive of the present Cabinet of England, summoning a new Conference of The Colonies for a "revised system of relations with the Asiatic countries and its people"—heralded in the summons as "those who are remembered gratefully for their contribution to Britain in the conflict for Anglo-Saxon civilization on the Fields of Flanders."

Note that Russia, with an alert glance at a new destiny, sees in all this revolving confusion, the Asiatic lands pouncing on the Philippines and Hawaii. This prospect is encouraged in the knowledge that Japan possesses every strategic island in the Central Pacific Ocean. Russia sees Japan commandeering China's four hundred millions as an ally in common grievance—confronting our forces on the shores of the sea. In this prospect Russia hopes to retake her former possession—now rich Alaska. It is in the division of our forces between the South Pacific and the North Behring Sea—to our hoped-for confusion—that Russia and Japan see their new era of conquest or compensation. From this aspect of Russian-Asiatic development, the new Russia enjoys the acquisition of an international government based on trade privileges through an area of fifteen million square miles and through a population of seven hundred millions.

All this new era of international government of Europe and Asia commands the United States, in some proper manner to "Prepare and Beware!"

To those of mistaken mission—maddened by misunderstanding of our province and purpose, our Land exclaims, in the words of Job:

> "Far be it from me that I should justify you—
> Yet know, I carry no oath against thee.
> 'Till I die I will not put away my integrity from me.
> My righteousness I hold fast and will not let it go."

Now, all this that we this day confront reveals to me the signposts of the new ways of international government. It calls on us to render unto our Caesar that which is Caesar's. We say the new construction works the reversion, by the old lands, to the sphere of the balance of power—commercial by name—military and naval by spheres. It all supersedes the Treaty of Versailles and St. Germain made under the Armistice. It degrades all provisions to establish world communion. It repudiates the principles for which the World War was fought by the United States—"to secure the common welfare for all races on equal basis." This new policy of Nations places each sphere of Europe and Asia in commercial and political antagonism to the objects of the United States of America. We do not resent these attitudes of Europe and Asia, nor deny the *right of these countries to enter into arrangements which they assume* to be to their interest and welfare. *But we do now announce* to the world that the position so taken by the motherlands of Europe and Asia compels the United States for her own defence and protection to Now array this Continent and Western Hemisphere in common interest and common object in a geographical unit as "American Continent for American Protection." With only the kindliest feelings to all people; with desire to be associated with them all in maintaining Justice and Liberty, we summon to the United States the lands of Canada and the Australias. These we would unite in compact with Central America and South America—all in one Continent of single purpose—to defend ourselves against all advance of force from Asia or Europe. In the words of Canning: we call up the New World to balance the Old. As compensations for the new balance, we would grant the preferences of our finance and commerce in the first instance to our own Continent, under the supervision of the United States. Such policy creates a sphere of Continental Power for All America, and makes of the Continent of America an *American Continent.*

With this combination the Continent may oppose any other sphere of activities which would move against its common interests. This course by America is not taken as one of antagonism to any country, or of prejudice to any people. It is one in natural defence of the Continent of America and in the advancement of American Progress. It but asserts the natural evolution of the United States in the new events of the World, recorded in the words of New England's philosopher-poet:

> "Our mission—to uplift
> Purify and redeem by its own gracious gift—
> The World—in spite of the World's dull endeavor
> To drag down and degrade, and oppose it forever."

With this policy I have put forth, the United States has a defence against assault in the distances that stretching seas afford; it has the common interest and the co-operation of united, continental resources of commerce and Western civilization. It has the fraternity of all the members of all the American continent; while it presents the Continent of America as the guiding and dominating force of the new politically constructed World. In this new sphere of our international relations of the tomorrows—the United States will stand as sponsor to those Doctrines of Liberty of Man

and Justice to Nations, that shall insure prosperity to all people, and peace to all Nations of Earth.

And as our new mission, we will present our consolidated self as Envoy of Peace to Earth and Courier of Good-Will to Man. To each land fretting in grievance against its fellows, we will offer our New Continent as the New Union of New Harmony. We will ask that the cause of dissension be heard before us and be adjudged by us, in suggestion of Friendship.

We who seek no conquest of territory; ask no reward for intercession; demand no monopoly of concessions; with only generosities to scatter, we seek from mankind only that which Heaven asks of its children—Love and Faith. Then, as the Intermediator, coming with intervention of Brotherhood that has lifted the fallen, given freedom to the oppressed, financed national poverty, clothed the naked and fed the hungry of Earth; lined on the shores of time, we, as the Evangel doing the Service of God, will compose the strife of Nations, melt the suspicious of men, bring back to kinship the divided families of race, and circle in one round of Union a New Faith in a New World to a People Everywhere of New Hope.

So, in the new era of international Government, our country will enter the New Temple with her brow bound about by The Commandments of God, bearing in her right hand The Sermon on the Mount and holding in her left hand The Constitution of the United States. Armored in this Trinity we advance as the Ambassador of Christian Civilization; and if the World shall ring out the challenge, "Who Comes!"—let us know that the whole Earth in gladness will give the countersign, answering—"Thank God, This Is America."

CURRENT LEGISLATION

Workmen's Compensation for Diseases Due to Employment

By J. P. CHAMBERLAIN

ONE of the advantages of our system of forty-eight separate state jurisdictions has been said to be the value of having forty-eight different legislatures working on the same problem, therefore bringing to bear upon its solution forty-eight different points of view. The ingenuity of American lawmakers has not been equal to finding forty-eight varieties of rules to apply to the same state of facts, but they do show an interesting difference in dealing with new subjects of legislation. Perhaps in no case is this more notable than in workmen's compensation and even in the limited field which is the subject of this article, four separate ways of dealing with occupational diseases have been devised by the comparatively few states of the union which have attempted to cover the subject at all.

Workmen's compensation is a striking example of the importance of the study of comparative legislation. The system was borrowed by European countries from Germany and was finally brought to this country from Great Britain, so it is in the British decisions of legislation that we must look for the genesis of the American rules.

What to do with diseases which could be traced to the occupation came before the British courts very early in their dealings with the compensation law. One of the first states of fact on which the courts were called upon to express themselves arose when a wool sorter asked for compensation for anthrax. The court found that the disease got into his system by a germ from the wool he was handling in the course of his employment. The germ happened to strike his eye and entered through it into his system where the disease developed. The English statute granted compensation for injuries resulting from "accidents," so the court was obliged to consider the "meaning to be attributed to the word 'accident.'" The judges thought that this disease was plainly attributable to the nature of the man's employment. The anthrax germ is communicated to the human being from animal matter, principally wool and hides, and they thought that in this instance it was of a sudden origin and not a normal consequence of the work. They held, therefore, that the disease was the result of the accident of there being anthrax in a particular lot of wool and the germ finding lodgment in a portion of the workman's body through which it could easily penetrate into his system.[1]

Having settled that all diseases resulting from an accident were compensable, the British courts have been liberal in applying their act in such cases. They have held that a heat-stroke sustained by a stoker in the stoke hole of a steamer and kidney disease due to a chill contracted while working waist deep in water were injuries by accident.[2] An interesting instance was one in which a seaman got sunstroke while painting his ship under a tropical sun. The Court of Appeals confirmed an award of the lower court in the man's favor, as they said he was exposed to a peculiar risk from the reflected heat.[3]

The courts had had trouble enough settling the cases like these in which the injury only came after the accident and the man was a normal human being prior to the accident. However, few men are normal human beings; it has been said that a healthy man is one who has a disease of which he knows and takes care. What should be done, therefore, where the stoker died from the heatstroke because he was himself in bad health? Had he been a per-

1. Brintons, Ltd. v. Turvey (H. of L.) 7 B. W. C. C. 1.
2. Some Recent Decisions under the Workmen's Compensation Acts of Massachusetts and Michigan. Francis H. Bohlen, 14 Columbia Law Review 563.
3. Morgan v. Owners of Steamship Zenaida, 2 B. W. C. C. New Series 19.

fectly well man he should not have suffered from the effort. The exposure alone was not the cause of his death, but it was the exposure joined to his sub-normal physical state. Notwithstanding these contentions the court granted compensation. Lord Loreburn said, "To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who has died from a heat-stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what has befallen him is to be regarded as an accident or not."[4]

Again a workman who had heart trouble died from an exertion which in the case of a man with a sound heart would have been harmless. The court gave him compensation.[5] Consequently, the employer takes the risk of the physical condition of each of his employes, so far as his duty to pay compensation is concerned. It was feared that as a result workmen who were not in good condition would not be employed. Lord Shaw in his dissent in the case of the man with heart disease said: "A new peril will have been introduced into the lives of many workers who, notwithstanding debility and chronic disease, are most anxious and willing to devote their remaining powers to earning an independent livelihood. Should such persons be held to carry with them into and upon employment the serious additional liability alluded to, employment may become for such persons—often the most needy and deserving of the population—more difficult to obtain." Nevertheless the rule has not been disturbed and it seems probable that the serious economic result foreseen by Lord Shaw has not come about.

On another footing, however, stood the instances in which the workman contracted a true occupational disease, such as lead poisoning. Here the English courts said that the disease was not the result of an unexpected happening but a natural consequence of the employment. In addition, the injury caused by such diseases is the result of continued exposure to the conditions which bring it about and therefore the employer in whose employment the man was working at the time at which the injury happened, that is, when he was obliged to cease work, should not be held solely responsible, since the injury was the result of an accumulation of poison in the man's system for many years and therefore in most cases under many employers. In the case of the true "accident" the disease could be traced to a particular period of time and a particular happening, so the employer liable was ascertainable. The judges would not apply the compensation act to cases of lead poisoning[6] or to cases of a disease of miners known as beat hand or beat knee.[7]

The courts in the United States took over from the English judges the rules as to the meaning of the word "accident" and included injury from diseases resulting fom the accident. The New York act expressly provides that injury and personal injury include "such disease or infection as may naturally and unavoidably result" from accidental injuries.[8] Applying this act to diseases, the word accidental has been defined as "happening by chance" or "unexpectedly taking place," or as "an event that occurs on the instant rather than something that continues or develops." In applying this section the courts have held as subject to compensation many common diseases where they were in some way the result of an accident. For example, an award for tuberculosis was sustained where the employe was working for his employer operating a crane and, to save himself from injury when a timber broke, jumped into the river and contracted a heavy cold and pleurisy from the exposure which developed into pulmonary tuberculosis.[9] An award for death from pneumonia has been sustained where the employee of a steel company was injured and died four days later of lobar pneumonia.[10] In another case an award for tuberculosis was sustained where a car washer in a garage was injured and shortly afterward developed pulmonary tuberculosis from which he died within a year from the accident.[11] Where there was medical evidence that tuberculosis resulted from a fall, an award could be made for the death.[12]

Other state courts have been liberal in applying the same rule. An extreme case in which compensation was allowed for an illness under this theory was decided by the Wisconsin courts. A man in a lumber camp contracted typhoid. There was evidence to show that the employer had negligently allowed the drinking water for the camp to become contaminated. The court said that the man was obliged to drink the water supply and it was a compensable injury traceable to the particular employer.[13]

In another interesting case the Connecticut court held an insurance company liable for compensation to an insurance solicitor who was frost bitten while on his rounds and who subsequently died. The injury came about through the entry of the germs of erysipelas into the wound resulting from frostbite and the man's death from erysipelas was a consequence of the primary injury, the frostbite, which arose out of his employment.[14]

The American courts have adopted the British rule in respect to compensation where a preexisting disease is lit up or aggravated by the accident. Chief Justice Rugg of Massachusetts states the case thus: "It is the hazard of the employment acting upon the particular employee in this condition of health and not what that hazard would be if acting upon a healthy employee or upon the average employee."[15]

The Appellate Court in Indiana said that if "the disease as it in fact exists is by the injury materially aggravated or accelerated, resulting in disability or death earlier than would have otherwise occurred, and the disability or death does not result from the disease alone progressing naturally as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the compensation acts."[16] The rule has been applied to injuries resulting from many

4. Ismay, Imrie & Co. v. Williamson, 99 L. T. Rep. 595 (1908), A. C. 436.
5. Clover Clayton Co. v. Hughes, 3 B. W. C. C. New Series 275. For other instances see article cited.
6. Steel v. Cammell, Laird & Co., 7 W. C. C. 9, Williams v. Duncan, 1 W. C. C. 123.
7. Marshall v. East Holywell Coal Co., 7 W. C. C. 19.
8. Section 2, (7) Workmen's Compensation Law.
9. Matter of Rist v. Larkin & Sangster, 171 A. D. 71.
10. Delso v. Crucible Steel Co., 195 A. D. 288.
11. McGoey v. Turin Garage Co., 195 A. D. 436.
12. Van Gordon v. Hires Condensed Milk Co., 193 A. D. 601.
13. Vennen v. New Dells Lumber Co., 161 Wisc. 370. Question of proof whether the water was the cause of the typhoid. Where this is not shown compensation cannot be paid. (California Accident Commission, 3 California Industrial Accident Commission 344.)
14. Larke v. Mutual Life Insurance Company, 97 Atl. 320.
15. In Re Madden, 222 Mass. 487, 494, 111 N. E. 382.
16. Re Bowers, 116 N. E. 842.

ordinary diseases such as cancer where the accident hastens death,[17] and to death resulting from heart trouble accelerated by strain.[18] So where latent tuberculosis was lit up by an accident, the resulting illness might be compensated as an injury resulting from the accident.[19]

Both in Connecticut and California a section has been introduced into the compensation act which would make the injury resulting from the aggravation of a preexisting disease only compensable for such "proportion of the disability in the aggravation of such prior disease as may reasonably be attributed to the injury."[20] In Connecticut, however, this section has been construed to apply only to occupational diseases and not to affect cases where the disease resulted from acidents such as those which have been above considered.[21] In California the Accident Commission has applied it to the aggravation of prior diseases by an accident as well as occupational diseases, but have had difficulty in making the proportional division of disability.[22] The Commission has further limited the section by applying it only to an active and progressive disease and not to a mere tendency.[23]

The difficulties which the English court pointed out would come about from an attempt to apply the usual form of compensation law to occupational diseases, led Parliament to cover compensation for industrial diseases under a special act. Under the ordinary compensation act the injury arises from an accident which occurs at a specified time under a specified employer. An occupational disease arises through the cumulative effect of exposure to some process in the occupation. It may well be that the man before he was obliged to quit work was employed in a plant under the best possible hygienic conditions and his disease was largely due to the unhygienic conditions in other plants in which he had been previously employed. It is evident, therefore, that it would be unreasonable to say that the injury was the result of a happening while he was in the last employment, but the task of proving in which employment the disease had actually been begun would be practically impossible. Furthermore, if the man had changed employers frequently it could well be argued that he had not been exposed for a sufficiently long period while in any single employment to cause incapacity, so that though the industry had unquestionably caused his incapacity, no one employer could be taxed with it.

Furthermore, compensation is based on a percentage of wages and it could very well happen that the individual workman would have received a different rate of compensation from each employer. Reckoning the amount of his compensation would, therefore, be complicated and even if the disease be treated as accelerated in each employment and each employer be held liable for the amount of acceleration, it would be very hard on the man to take proceedings against each employer and to compel each employer to pay a small portion of the total of his compensation. The British act met these difficulties by making the last employer liable for the total compensation and by making the basis of compensation the wages received by the man when last employed in an occupation in which he might have contracted the disease. The act recognized the liability of prior employers by giving to the employer primarily liable for compensation the right to compel contribution by all of the employers for whom the man had worked during the preceding twelve months. To protect this right the workman was compelled to give the last employer the names of these previous employers and if he did not do so the last employer was not liable to pay compensation if he could prove that the disease was not contracted while in his employment.

Thus the responsibility, not of a particular employer as in the case of an accident, but of the industry, was recognized to a limited extent and this point was accentuated by a provision for the creation of a single insurance carrier in each industry for occupational diseases to which all the employers might be compelled to subscribe. In practice this system of a mutual carrier in different branches of the industry has not been applied.

Another great difficulty is the vagueness of the term "occupational disease." There are many diseases to which the public is susceptible, but which may be caused or aggravated or accelerated wholly or partly by special conditions of labor.[24] There is also a class of diseases arising from occupational poisons or conditions to which the public is not subject, but which are clearly the result of labor in a particular employment. It would be very difficult to prove that a particular process could cause the disease in many cases and it would be peculiarly difficult to apportion the extent to which industry was liable for accelerating or aggravating the kind of disease to which the public in general was liable. The British act met these two points by limiting compensation to a list of the diseases for which compensation is payable and by setting opposite each disease on the list the process in which it was presumed that the disease set opposite it might be contracted. Thus the employer and insurance carrier had a specific and not a vague general liability and the employee was given an easy means of proof that he had contracted the disease in a particular employment. Experience could be counted upon to bring to light new occupational diseases for which compensation should be granted, so the British Act allows the Home Secretary to add new diseases and new processes to the list. The question of proof was also made easier in the British Act by providing an official surgeon who fixed the fact of the disease and the date of disability. From his opinion an appeal was allowed to a medical referee whose decision was final. So the medical question was passed on by a medical judge and not by a law judge. The employer could always prove that his employment had nothing to do with the disease, but it is evident that he would have a very hard time in doing so.

As the employer was to be liable for all occupational diseases acquired in his plant, and as a matter of fact occupational diseases are cumulative, so that a man who is already sick is apt to finally succumb if he stays in the employment long enough, the British Act gave the employer the means of

17. Vorhees v. Schoemaker, 86 N. J. L. 500. 2 California Industrial Accident Commission 55.

18. Winter v. Atkinson Frizell Co., 11 N. C. C. A. 180. Uhl v. Guarantee Construction Co., N. Y., 174 A. D. 571.

19. Heileman Brewing Co. v. Schultz, 161 Wisc. 46. White v. Lauter, 37 N. J. L. J. 175.

20. Connecticut Chap. 142 Public Acts of 1919. California, Chap. 586, Acts of 1917.

21. Bongialatte v. H. Wales Lines Company, 97 Connecticut 548, (1921-22.)

22. California Accident Commission Reports, vol. 7 p. 125, vol. 8 p. 65.

23. For Statutes and Cases on diseases resulting from accident see Bradbury "Workmen's Compensation," Chap. VI, Art. B. Hill & Wilkins "Workmen's Compensation Statute Law"—Section XIII. Boyd "Workmen's Compensation," § 463. Francis H. Bohlen, "Drafting of Workmen's Compensation Acts." 25 Harvard Law Review 328.

24. Tecumseh Sherman, "Compensation for Industrial Disease." 65 Univ. of Penn. Law Review 523.

protection against diseased employees by a provision that the workman could not recover compensation if at the time of employment he wilfully represented himself in writing as not having previously suffered from the disease.

The British Act has been followed by several American legislatures. None, however, has set up an official surgeon to fix finally the facts of a disease and none has gone so far as to allow the inclusion of new diseases by an administrative authority. The Commissioners on Uniform State Laws used it as a model for their draft. They introduced a medical referee, but his report was advisory only, and they also changed the British rule as to the basis for compensation by requiring consideration of the wages earned in each employment during the past year.[25]

New York is one of the states which have followed Britain.[26] The New York act provides for examining physicians, but their opinions are not conclusive. The date of disablement is made the date determined by the board which grants compensation and there is a presumption that the employee employed in the process is disabled by a disease due to the nature of the employment, if the disease is that set opposite the process in the list. Minnesota and Ohio have acts of the same general form.[27] Ohio has a state fund in which all employers must insure so that the act does not contain any provision for recovery from subsequent employers, but does create a separate fund for occupational diseases. The act, however, does protect the industry against diseased employees by refusing compensation to the employee who at the time of entering employment from which the disease is claimed to have resulted, wilfully and falsely represents himself as not having suffered from the disease.

New Jersey [28] by a law passed at the recent session, modifies the usual form by fixing a list of diseases and not giving a list of processes. The act excludes from compensation persons who wilfully expose themselves to disease and such wilful self-exposure includes failure to observe rules tending to prevention of occupational disease made by the department and posted in the plant. It also requires petitions for compensation to be filed with the Secretary of the Compensation Bureau and, in addition to the usual provision exempting the employer from paying compensation if the employee in writing falsely represents that he has not suffered previously from the disease, exempts him if the employee has failed to state to the best of his knowledge on request of the employer the location, duration and nature of any previous employment in which he might have been exposed to the occupational disease.

Illinois [29] approaches the subject from a different angle by granting compensation for death from an occupational disease arising out of employment in specified processes, which include chiefly industrial poison and brass or lead works. This was partly the result of the fact that the compensation provision was an amendment of an act of 1911 regulating dangerous employments. The Illinois Act does not cover in detail the different points of administration which have been mentioned in connection with the other statutes. It simply grants compensation and makes no provision for contribution by other employers nor does it contain any aids to proof.

So here are three answers to the problem of occupational disease. The British system of lists of the processes and the specified diseases, the New Jersey idea of a list of diseases only, and the Illinois answer of a list of the processes, but not the diseases.

In all of these cases occupational disease was more or less closely defined but there remains a fourth answer to the occupational disease problem which consists in including under the general term "injury" occupational disease generally and leaving it to the courts to determine what is an occupational disease. The Massachusetts judges were the first to include occupational disease under the term "injury." When the matter first came before them they called attention to the fact that their act gave compensation for "injury" and did not, as did the British act, limit compensation to injuries "by accident." Therefore, though it could not be said that an occupational disease of slow onset was an injury by accident, it was evidently an injury attributable to the employment and therefore included under the term "injury" in the Massachusetts Act. They, therefore, gave compensation in a case where a man became blind by inhaling gas over a period of time in the course of his employment.[30] Later on in the leading case of Johnson v. The Insurance Co.,[31] the court held that the act applied to a case of lead poisoning. In the previous case the date of the injury was easily fixed as the date of the blindness but in this case it is impossible to fix the date on which the injury had occurred, since it was the result of exposure to lead over many years. The court, however, held the date was that on which the man became sick and had to quit work—"until then he had received no personal injury." The question of dividing the loss among various employers in the same trade did not come up in that case since the man had been employed by the same company for twenty years. Subsequently, however,[32] the Commission held liable the last employer in the case of a painter who had lead poisoning, although he had been employed by that employer only for a short time, and in O'Donnell's Case,[33] where the man died, although only employed for a short time, the same conclusion was reached. Although the court held in the O'Donnell case that the lead poisoning, which was a contributing cause of the employee's death, was progressive and probably due to the constant assimilation of lead during the years he had been exposed to it, they cited with approval the statement of the commissioner that the final assimilation which caused his death occurred during his employment with the last employer.

Recently, however, the Supreme Court in Massachusetts has twice said that occupational disease in itself was not included in the act. "It [the Act] cannot be held to cover disease contracted by the employee in the course of or arising out of their employment." [34] The language of the opinion in the Johnson case is, therefore, to be limited to the precise facts in that case. In Pimental's Case what the court said was dictum as the particular injury

25. Reports of American Bar Association 616, (1918).
26. Workmen's Compensation Law, Article III, and List of Diseases, Sec. 3 (2).
27. Minnesota, Chap. 82, Laws of 1921, Section 67. Ohio, 1921, House Bill 47, p. 181.
28. Chap. 124, 1924.
29. p. 351, Statutes of 1923.
30. Hurle v. The Insurance Co., 2 Mass. W. C. Rep. 95, 217 Mass. 223.
31. 2 Mass. W. C. C. 117, 217 Mass. 338.
32. Bowen v. The Insurance Company, 3 Mass. W. C. C. 112.
33. 22 Mass. W. C. C. 145, 237 Mass. 164.
34. Pimental's Case, 127 N. E. 424.

was found not to be due to the employment directly, but the court said that if it was an occupational disease, it was not included in the act. The court noted that in the previous cases the employee was suffering from poisoning arising from the performance of his work and that poisoning is to be regarded as a personal injury. In Re Maggelet,[35] the Supreme Court refused to hold neurosis of a cigar maker compensable and said that the act "gives compensation only for disease rightly described as personal injuries, but does not mention disease as such or occupational disease." Therefore, it would be very difficult to apply the Massachusetts Act to a disease to which the general public is liable as an occupational disease, although that disease may have been accelerated or even brought on by the conditions of the employment.

The act of Congress in respect to federal employees follows Massachusetts. It was at first held by the Attorney General that the act would not include occupational diseases, but he finally reversed his opinion and allowed compensation in these cases.[36] Recently the Comptroller General refused payment of awards for occupational diseases on the ground that the word "injury" did not cover them without a specific provision. Congress then passed an act[37] to authorize the continuing of payments on awards already made until March 1, 1924, and a bill was introduced into the last session of Congress to include occupational disease under the Federal Employees Compensation Act.[38] It has now become a law.

Wisconsin expressly included compensation for occupational disease in its compensation act by an amendment in 1919.[39] California also expressly includes occupational disease and a similar consequence was given to the act passed in Connecticut in 1919.[40] Under the sections of the laws adopted in both of these states providing that in case of aggravation of a disease compensation is only allowed for such proportion of the disability due to the aggravation of prior disease, there is a possibility that each employer will only be liable for the proportion of the injury which can be attributed to the acceleration of the disease which occurred in his employment.

Thus there are four methods of covering occupational disease in force in the United States at present. A laboratory of legislation is therefore provided in which studies should be made to determine the best method of handling this difficult subject. A study of the act and of its operation could be easily made, but it would require more than a study of the law and the reports of the commissions and the courts. There must be also a study of the results of the act in procuring justice to employers and to men and in operating smoothly and promptly to secure the payment of the compensation. Such studies would lay a sound basis for future legislation.

35. In Re Maggelet, 116 N. E. 972.
36. Bradbury's Workmen's Compensation, Vol. 1, pp. 341, 342ss.
37. Public 537, 67th Cong. 4th Session.
38. Public 196, 68th Congress H. R. 7041.
39. Wisconsin 2394-32 (1919).
40. California Statutes 1917, Chap. 586, §1, (4). Chap. 142 Connecticut Public Acts, 1919. Bongialatte v. H. Wales Lines Co., 97 Conn. 543, 1921-22.

The Grain That Grew

"The grain that grew in Westminster Hall is now sown in five continents. It has flourished and become diversified in transplantation. The American tradition is rich in legal achievements of its own and in the personality of famous jurists and advocates. Law is planted in the very midst of the American community, and under its shade it has worked and lived. But however the varying course of history may have differentiated the practice of the heritors, their unity in this respect, judged externally, is far more conspicuous and impressive than their diversity. There is the same belief in law itself. There is the same unshakable and instinctive conviction that reason and consent are the first and last safeguards of civilization. There is the same determination to spread peace and liberty through the wider operation of law. This conception of law and its spread is the greatest gift which the English-speaking race can claim to have made to the world. There is no greater marvel in the atlas than the extent of the territories over which the principle of order, founded, through law, upon freedom, has already been given effective supremacy. The world will move on from chaos or back to chaos accordingly as that principle is given a wider and wider international acceptance, and physical force is subordinated more and mose strictly to the service of law. This is the principle to which the English-speaking peoples have committed their whole future."—*The Observer* (London).

The Role of Canada

"The week's proceedings have helped to emphasize the value of the services that Canada can render in promoting closer relations between the British Empire and the United States. Canada, from her geographical position, can study American opinion more closely than many of us may hope to do, while, at the same time, she understands our point of view more readily, perhaps, than the American public is able to grasp it. The relations between Canada and her great neighbors have long been extremely intimate, in the intellectual no less than in the commercial sphere. Sir James Aikins, the president of the Canadian Bar Association, said in Westminster Hall on Monday that the only meeting ever held by the American Bar Association outside the United States until this week was the conference at Montreal eleven years ago, when the Canadian lawyers gave their guests a hearty welcome. The outcome of that visit was the formation of the Canadian Bar Association, to form a bond of unity between the nine Canadian Bars, and the Canadian and American lawyers have since then interchanged visits. Out of these meetings, which have been attended by some of our foremost lawyers, came the idea of this great reunion in London of the British, Canadian, and American Bars. Canada thus deserves her share of the credit for making this happy legal gathering possible. There are many spheres in which she may play her part as a mediator and interpreter between the British and American peoples."—*Daily Telegraph* (London).

The Visit to London

"As a 'Bar Meeting' it could not be described as there was really no formal meeting as such except one day at the Hotel Cecil when an informal meeting was held for the purpose of passing resolutions of thanks to our hosts the British and Canadian Bars. But as a series of entertainments unparalleled in beauty and in some instances in splendour nothing like it has ever occurred."—*Virginia Law Register.*

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ENGLISH AS A DEAD LANGUAGE

To speak of English as a dead language seems to invite criticism and to provoke controversy. For now more than at any other time those who speak it as what they lovingly call their "mother tongue" justly regard it as the living language of the commingled races, which hold a place of dominant importance among men. Its use is more widespread than ever before, it is daily heard in places as remote from the land of its origin and its name as the size of the earth permits. To characterize it as a dead language might be thought so obviously inconsistent with the evident fact as to be a plain misuse of the very language in which the statement is made. But when one stops to think of it, this seeming inconsistency only serves to emphasize by contrast the point which we make. And that point is that among lawyers, and only among lawyers, English is a dead language.

This proposition naturally involves the question of fact, what is a dead language? And perhaps we may without undue temerity venture to define it. A dead language is one which is written and never spoken. It is not a tongue; it addresses itself to the eye, not to the ear. It is a collection of those signs and symbols which we call letters and words. It lacks the vitalizing, the inspiriting, the inspiring quality of nature's method of communication from the heart and mind of one man to the heart and mind of another. It is a matter of mechanics and cold formality. The masters of the language, whose recorded word has come down to us, made us formulate the phrase "our mother tongue" and cherish it as a rich heritage, were those who succeeded in overcoming the chilling and benumbing influence of the written word, and made their pages glow by impressing upon them the living force of their own personality, because they wrote the living language of the men of their time.

The suggestion is not that it should be the aim of lawyers to make pages glow for the delight of posterity. Their work is practical; they deal with fact not with fancy. The point is not that lawyers do not speak good live English, but that they write dead English, an English which is dead not merely because no one speaks it, but because it never was spoken by living men. In the preparation of all their documents, lawyers unconsciously and from force of habit spend their time as mere translators. They are always changing the living language descriptive of actual things into this dead language; and, with careful attention to the rule of the translator, use the idioms of the language into which they translate.

To illustrate by example, familiar to those who live in the states where the comman law procedure, like the owl in the "ivy-mantled tower," still maintains its "ancient solitary reign": A man retaining a lawyer to bring suit for the non-payment of the price of goods submits to him the contract upon which his right is founded. And that contract may, and quite commonly will, consist of two telegrams, one offering to sell a definite quantity of certain goods upon terms stated with crisp brevity, and the other the mere words "offer accepted." To business men dealing directly with each other these few and simple phrases are sufficient to evidence what the law calls a "meeting of minds." And the lawyer will advise the client that the law agrees with him, and regards these two telegrams as constituting an enforceable written contract, with its legal consequences. And having given this advice he proceeds to lay the facts before the court, by the requisite written statement. This he ordinarily does by filling out a printed document bearing, by legitimate inheritance from a remote ancestry, the title "common counts"; couched in the formal phrases of the men who knew Westminster Hall when it was a modern building; and containing nearly three times as many words as the Gettysburg Speech.

The document which he thus prepares to present to a live man upon the bench the facts of a case between two live men before the bar, avers that the plaintiff sold the defendant "goods, wares and merchandise" using three words where one would suffice

if it stated the character of the goods, as neither of these words does. Having made this statement, which, in view of what follows, seems like a casual aside, the lawyer avers—without any foundation in the facts—that between these parties there had occurred all of the ordinary transactions of life from which a money liability results. And in thus stating both what did, and what did not, occur, he employs, not the English language which he uses in his own transactions, or which anyone at anytime ever used in his own transactions, but only that which is the idiom and form of the dead language into which he feels bound to translate the statement of the case.

If the case presented to him is an equitable one, it might well be thought that, both originally and in modern practice, the proceedings in a "court of conscience" would show direct simplicity as their dominant note. And this would seem to be more impressively true when it is remembered that the basic idea which created the court and fostered the development of its jurisdiction was that parties should be freed from the hardships which the subtleties of the common law had produced. Yet we have only to read the old forms of bill and answer, with the standards of clear expression in good English in mind, to realize how that which is necessary to a statement of the case is so overgrown by a mere orotund collection of extra words that they seem designed to conceal something by a sort of protective coloration. And when it comes to the replication intelligence stands aghast in an attempt to understand it as the product of a human brain. Familiarity with it has bred indifference; greater familiarity will breed contempt. As a test, read it out loud; give to it the vital quality of vocal utterance, and then conceive of it as a serious statement for the enlightenment of a court as to the questions really in issue. If the complainant's counsel recited it in his opening statement, the judge would think that he was being derided.

But perhaps it would not be fair to give illustrations only from court proceedings, where a certain amount of "pomp and circumstance" is to be expected. And we may therefore, while still using the same material, reverse the form of its use. If a lawyer were asked to prepare a written contract for the parties who told him that they had made the agreement evidenced by the telegrams referred to, would he, in putting their agreement into written words, use the simple, effectual phraseology of those telegrams? He would advise the client that that crisp phraseology, if used by the client himself, was all that was needed. But with the dead hand of tradition stretching out and controlling his intellect when he went to writing himself, he would write *currente calamo* and produce a document which he regarded as worthy of professional skill and respectful to ancestral loquacity.

That the Codes of Procedure have wrought a considerable change in the method of expressing facts in written pleadings is of course admitted. But while they usually call for "a concise statement of the cause of action or defence in ordinary language," their dominant purpose was to do away with the old forms of court procedure, and the dual and duplicated structure of law and chancery. They give to the lawyer a greater freedom in that which, after all, must be his individual work. But this "New Freedom" has not been fully availed of, and we still see in code pleadings, like footprints in sandstone, abundant traces of strange and ancient forms. The new Federal Equity Rules have enlarged this freedom, and encouraged its exercise, and their effect is already noteworthy.

But these are efforts to bring about reform by the exercise of authority. The old forms and formularies were never of legislative origin; no popular assembly can be held responsible for their existence. We lawyers created them and have continued them, and it is for us to restore to our common language as we use it professionally that living energy which elicits our respect and our praise when we read from the pages of those who write, or who long ago wrote, according to the best standards of good English. This does not require the adoption of a telegraphic form of expression. It only requires that we understand that that which is written for men to read when they are sitting as judges is not necessarily governed by principles or methods essentially different from those which we apply when we write something to be read by them as laymen. The object to be attained is the same, a clear statement with that conciseness which is consistent with both clarity and completeness. There always has been, and always will be, a difference between the written and the spoken word, but this distinction is not one which is created, or definitely marked by the threshold of a courtroom.

H. T.

THE DEAD HAND—I

Amendments of University Charters—Lord Eldon on the Will of the Founder—Thomas Brown's Bequest—The Dartmouth College Case—What Was Left Out of Webster's Printed Argument—Lines of Defense Against Control of the Past—Chicago Lake Front Case—The Great Endowments, etc., etc.*

By CHARLES P. MEGAN
Of the Chicago, Illinois, Bar

A SHORT time ago there was filed for record, in the recorder's office here, an amendment to the charter of the University of Chicago, increasing the number of trustees from 21 to 25, and removing the requirement that the president must be a member of a particular church.

A similar change was proposed at Brown University in 1910. Brown's charter was granted by the Rhode Island legislature in 1764,—a most liberal charter, based on very full denominational cooperation. The provision was that of the 36 trustees, 22 should be Baptists, 5 Quakers, 4 Congregationalists, and 5 Episcopalians; the president also was to be a Baptist.

After a century and a half under this charter, difficulties began to suggest themselves, of which one may illustrate all. Quakers are not often found nowadays at Brown, and it was said that vacancies in the five places on the board of trustees designated for Quakers could only be filled by electing men who knew nothing of Brown.

A strong committee of nine Brown men took up the question, the best-known member being Charles E. Hughes, then governor of New York. Brown, they said, has nourished freedom of thought and has taught its students religious tolerance, and then after graduation, if they join any church outside the four mentioned in the charter of 1764, they are excluded from sharing in the government of the University of which they are alumni. Not one of the other colleges founded before the revolution now has organic connection with any particular denomination. Disclaiming any desire to make Brown "religiously neutral," insisting on it as a Christian college, the committee recommended an amendment to the charter which would remove all denominational requirements.

Someone, however, suggested that it was not within the power of the present generation to "write a new charter for Brown University," (as it was put): they were "limited to a just interpretation of the present instrument." "If," said one of the committee, "we can write our ideas into this ancient document, what is to prevent any group of our successors from writing in theirs?"

A law sub-committee, with Mr. Hughes as a member, reported on this question of power to amend the charter. They began with what they described as "a well-established principle of American constitutional law" that a charter is a contract with the State, and unless the right to amend is reserved either in the charter or by general law, the provisions of the charter cannot be changed by the legislature without the consent of the corporation. But can the charter be amended *with* such consent? A contract may be changed, with the consent of all parties, but who are the parties in the case of the incorporation of a college? The trustees, of course, and the State, but the beneficiaries of the trust also, and probably the donors,—all the donors, whether original or subsequent. The consent of the last two classes (beneficiaries and donors) cannot be had, it is clear.

It may be, said the law committee, that the amendment proposed at Brown is one that promotes the purpose of the foundation and is altogether to be desired, but the arrangement is not that for which the original donors or later benefactors contracted, and which they are entitled to have continued. The law committee therefore concluded that a court of equity would hold the proposed amendment invalid, even when enacted by the legislature and accepted by the governing body of the University. Since Yale's charter was amended in 1792 and 1871, Princeton's in 1864, 1868, and 1901, Bowdoin's in 1892, and Dartmouth's in 1893, the law committee thought perhaps nobody would attack the Brown amendment. Notwithstanding this, one of the dissenting members of the general committee saw his idea govern the situation. He wrote in his minority report:

> The question is not wholly or principally, what is for the immediate advantage of the University. . . . The language of Chief Justice Marshall referring to the changes made by the Legislature in the charter of Dartmouth appears to be relevant. He said: "These may be important to the advantage of this college in particular and may be for the advantage of literature in general, but they are not according to the will of the donors and are subversive of that contract on the faith of which their property was given."

No satisfactory answer being made to this objection, the whole project was dropped, and the charter of Brown remains unchanged.

§

In the year 1805, Lord Eldon, England's greatest Lord Chancellor, refused to allow the Leeds Grammar School to engage teachers of reading, writing, German, French, or mathematics, mistakenly supposing that in 1552, when the school was founded, nothing but Greek and Latin was taught in grammar schools.

"The question," he said, "is not what are the qualifications most suitable to the rising generation of the place where the charitable foundation subsists; but what are the qualifications intended (i. e., by the founder). If upon the instruments of donation the charity intended was for the purpose of carrying on free teaching in what is called a free grammar school, I am not aware, nor can I recollect from any case, what authority this Court has to say that the conversion of that institution, by

*Paper read before the Chicago Literary Club at a recent meeting.

filling a school, intended for that mode of education, with scholars learning the German and French languages, and anything except Greek and Latin, is within the power of this Court. The difficulty is insuperable."

There was discontent in England over the decision of which this is a fair example. Parliament appointed commissions and debated bills, but very little progress was made.

Fifty years later, in 1852, Thomas Brown died, leaving property to the University of London to found "an institution for investigating, studying and without charge, endeavouring to cure" the maladies of quadrupeds or birds useful to man; this was to be founded "within a mile of either Westminster, Southwark, or Dublin." The University authorities found that the sum available was so small that it would be exhausted by the purchase of a site and the erection of a building, unless the thing were done on so small a scale as to render the whole project almost useless. The University proposed instead to establish a special department of veterinary science and practice, thus carrying out the testator's wishes in spirit, when it was seen that they could be carried out but poorly in letter. The Charity Commissioners agreed with the University authorities, and application was made to parliament for leave to do as suggested. In the House of Lords, Lord Cairns, one of the ablest lawyers of his day, for a time Lord Chancellor, opposed the bill. *The Times* reported him thus:

> The question was not whether Mr. Brown made the wisest will, not whether their lordships could not have made a better. . . . The question now was whether the Charity Commissioners had a right to make a *new will* for the testator. . . . The new scheme might be a very good one, but it was at all events *totally different from that of the* testator, because it swept away the idea of a sanatorium, and substituted for it the general idea of improving veterinary science. . . . In conclusion, he expressed a hope that their lordships would not take the *violent step of setting aside the will of the testator.*

The bill was beaten in the House of Lords exactly 3 to 1, and the University went ahead and built the hospital. The difficulty had proved insuperable.

§

On January 31, 1801, the nomination of John Marshall as chief justice of the supreme court of the United States was confirmed by the senate. A month later Jefferson was inaugurated as president. All other vacancies in the federal judiciary had already been filled by federalists,—appointed for life. Jefferson wrote to Mrs. John Adams, June 13, 1804: "I can say with truth that one act of Mr. Adams' life, and one only, ever gave me a moment's personal displeasure. I did consider his last appointments to office as personally unkind. They were from my most ardent political enemies. . . It seemed only common justice to leave a successor free to act by instruments of his own choice."

Was Jefferson right or wrong in this? There is now pending, and receiving very general support, a proposal for a constitutional amendment which would permit the newly-elected president, vice-president, and congress to take office more promptly after their election. In advocacy of this plan, which would have been very useful indeed in the winter of 1860-61, John W. Davis said to the American Bar Association last summer:

> We have limped along for a century and a half under an arrangement which leaves a dying administration to drag out its existence through four months of growing impotence . . . and which stays for twelve months the execution of a popular mandate. In no other country in the world where democracy prevails is there so wide a span between the declaration and the execution of the popular will.

§

One other appointment to the supreme court may engage our attention for a minute, that of Joseph Story of Massachusetts, in 1811. Jefferson never liked Story, and no one to this day knows why Madison chose him, at thirty-two years of age. But the future was his; he is probably the greatest figure in American law. Story was a republican (a democrat, as we should now say), otherwise he would not have been appointed by Madison; Madison frankly said so; but Marshall soon converted him, and late in life he proudly declared himself of the school of Marshall. Among Story's achievements was the creation of the admiralty law of the United States. At the same time the admiralty law of England was being formulated by another great judge, Sir William Scott, the brother of Lord Eldon. Story and Scott corresponded, and on May 20, 1820, Story wrote Scott thus:

> It so happened, that while the British Parliament was engaged in discussing the abuses of Charitable Institutions in England, and the nature and extent of the remedies which Parliament could justly apply, some questions of an analogous nature were discussed in our Courts of Justice; and the constitutional authority of our legislatures to interfere with and alter the charters of charitable corporations seriously denied. I have thought that it might not be uninteresting to you to know the views which are entertained in America on this subject, and to read the decision which has been pronounced by the Court of the last resort. If I do not mistake, you have taken a deep interest in Parliament, in the recent measure adopted there; and Lord Eldon, I hope, may be gratified by perceiving how strictly his own principles have been adopted in America, as to the rights and duties of charitable corporations, at a time when such a coincidence of opinion was unknown to all of us. I have, therefore, sent you two copies of the case of the Trustees of Dartmouth College against Woodward, one of which I beg you to accept, and the other to give to Lord Eldon as a slight mark of my respect for his judicial character.

§

The Dartmouth College charter had been obtained in 1769 by the Reverend Eleazar Wheelock from the governor of New Hampshire. It provided for twelve trustees. On the first set six were public officers (five of New Hampshire and one of Connecticut), the other six (including Wheelock) were Connecticut ministers, but the governor of New Hampshire was the only *ex officio* member; otherwise all vacancies were to be filled by the board itself. The college was to be entirely undenominational.

I must now go to the year 1816. The genius of Jefferson was dominant: the federalists, as a party, had disappeared. But the clergymen of the established church of New England were still federalists, "disliking" (it has been said) "Jefferson's politics," but "*hating* him personally, on account of his heterodoxy in religion." Hamilton had suggested in 1802 that a conference of federalists be called, to form the "Christian Constitutional Society," and fight Jefferson. The double name would do credit to the gentlemen who devise modern advertising "slogans." There was besides a local religious issue at Dartmouth. Eleazar Wheelock had died in 1789, and his son John had succeeded him.

John had been a student at Yale, and he fell under suspicion of having received there a slight taint of Presbyterianism; the trustees of Dartmouth were Puritans on the original foundation (that is, Congregationalists). The breach between them and John Wheelock widening, they removed him from the presidency. A state election was coming on, and Wheelock carried the fight to the people.

With religion and politics both in the case, the battle was hot. The republicans (that is, the democrats) won. The new governor, William Plumer, asked the legislature to amend the Dartmouth charter, saying that the college was founded for the public good, not for the benefit of its trustees; and that the right to amend acts of incorporation of this nature had been exercised by all governments, both monarchical and republican.

Plumer sent Jefferson a copy of his message, and Jefferson replied:

> The idea that institutions established for the use of the nation cannot be touched nor modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may, perhaps, be a salutary provision against the abuses of a monarch, but it is most absurd against the nation itself.
>
> Yet (he said) his political and church opponents generally inculcate this doctrine, and suppose that preceeding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves; and that we, in like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine, that the earth belongs to the dead, and not to the living.

The legislature amended the charter by increasing the number of trustees from 12 to 21, the additional 9 to be appointed by the governor, and by giving most of the power to a new body of 25, called overseers. The old trustees formally protested, saying, among other things, that their charter was a contract with the State, and that the amendment violated the section of the federal constitution which declares, "No state shall make any law impairing the obligation of contracts." The suggestion did not impress lawyers.

The new officers took hold, among them William Woodward, grandson of Eleazar Wheelock. He was secretary of the old board, but elected to stand by his uncle and cast his lot with the new board, and he was elected their secretary, and so held for them the college seal and books of account. Demand for them was made on him by the old trustees; he refused, and a suit was brought against him. Other suits were later projected and some were commenced, but this is the one that finally got to the Supreme Court of the United States and is famous as the Dartmouth College case.

It is (with the exception, I suppose, of the Dred Scott case) the greatest case in American history, but it is one of the most unsatisfactory. It was never properly argued for the State. The handling of the case for the old trustees, on the other hand, by Mason, Smith, Hopkinson, and Daniel Webster, was masterly at every point.

The state court decided against the old trustees, and the judgment was affirmed by the supreme court of the state.

The next and last resort was the United States Supreme Court. But not every case may be taken there. There must be a federal question. (It will be remembered that the favorite "due process of law" clause was not applied to State legislation until fifty years later, in the fourteenth amendment, following the civil war.) Here came in the layman's suggestion about the obligation of contracts. The point was not very promising; Webster seems never to have had much (if any) confidence in it; but there had to be a federal question, and this seemed the only possible federal question; and the case was won on that point.

The argument at Washington was on March 10, 11, and 12, 1818. When Webster afterwards saw his argument in print he said that there was something left out. What that something was, that was left out, we may guess, for by a sort of literary miracle the scene lives again for anyone who chooses to read.

"It is, sir, as I have said, a small college. And yet there are those who love it—" . . .

"Sir, I know not how others may feel, but, for myself, when I see my Alma Mater surrounded, like Caesar in the senate-house, by those who are reiterating stab after stab, I would not, for this right hand, have her to turn to me, and say *Et tu quoque mi fili!* And thou too, my son!"

§

This is magnificent, but it is not law; and we are all mistaken about the "something" that was "left out." Let me read from the Life of Webster by Henry Cabot Lodge, who will scarcely be accused of an anti-federalist bias:

> The first point was to increase the sympathy of the Chief Justice to an eager and even passionate support. Mr. Webster knew the chord to strike, and he touched it with a master hand. This was the "something left out," of which we knew the general drift, and we can easily imagine the effect. In the midst of all the legal and constitutional arguments, relevant and irrelevant, even in the pathetic appeal which he used so well in behalf of his Alma Mater, Mr. Webster boldly and yet skillfully introduced the political view of the case. On this he relied to arouse Marshall, whom he thoroughly understood. In occasional sentences he pictured his beloved college under the wise rule of Federalists and of the Church. He depicted the party assault that was made upon her. He showed the citadel of learning threatened with unholy invasion and falling helplessly into the hands of Jacobins and free-thinkers. As the tide of his resistless and solemn eloquence, mingled with his masterly argument, flowed on, we can imagine how the great Chief Justice roused like an old war-horse at the sound of the trumpet. . . . Once more it was Marshall against Jefferson—the judge against the president. . . . The joy of battle must have glowed once more in the old man's breast as he grasped anew his weapons and prepared with all the force of his indomitable will to raise yet another constitutional barrier across the path of his ancient enemies.
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> We cannot but feel that Mr. Webster's lost passages, embodying this political appeal, did the work, and that the result was settled when the political passions of the Chief Justice were fairly aroused.

It appears that Marshall must have found only one of the judges of the supreme court on his side, and five against him, and the decision of the case was postponed a year. The matter was managed like a political campaign. Public opinion was organized, briefs were sent to such great federalist judges as Chancellor Kent of New York, who in turn were consulted by some of the judges of the Supreme Court. You will find an account in Lodge; it is not particularly edifying.

On February 2, 1819, the court met. Marshall at once began reading his opinion, which declared the law amending the charter unconstitutional, as impairing the obligation of a contract. Story concurred, and so did all the other judges but two.

I have no space to discuss the legal points involved in the decision. I may however mention three matters briefly. First, Marshall elsewhere reminded us that it is a constitution we are expounding. Words are to be taken in their ordinary sense, as the common man understands them; and the common man scarcely thinks of a charter of incorporation as a contract with the State. If it is not, there was no federal question, and the Supreme Court had no jurisdiction. Second, I doubt if a colonial governor had authority (I mean from his principal the king) to grant an irrevocable charter; and Chief Justice Doe of New Hampshire (a Dartmouth College graduate and so within the terms of Webster's curse) has shown that the king himself could not grant an irrevocable charter, and would not have dared to give one, in 1769,—he well knew why he was king, and not Charles Edward Stuart. Third, it was feared by the old trustees, and believed by Marshall, that, if the Dartmouth College charter were taken away or substantially altered, the college property would either revert to the donors or escheat to the State, and in either event be lost to the college. This idea has long been exploded; it is now well understood that, if a charitable purpose fails, the property will be applied cy-prés,—that is, as near as may be to the intention of the donor. In 1887 congress revoked the charter of the Mormon Church (it being a territorial corporation), and applied its property (a million dollars in real estate and two million in personalty) cy-prés, giving it to the public school system of Utah. The doctrine has been developed very fully by courts of chancery in the administration of charitable trusts, but mostly since 1800; a writer on the history of philanthropy refers to a time when "even the cy-prés doctrine, that timid substitute for a straightforward social control, was not yet introduced."

§

In the opinion rendered by Marshall he does not cite a single case. But he was not deciding a law-suit; he was declaring a great public policy; he was a prophet, laying down a moral law for the whole people. He here made law, and the law he made, and was resolved to make, had nothing particular to do with college charters. He simply seized the opportunity of enforcing a supreme national duty.

During and after the revolutionary war, public and private debts were enormous. Paper money fell to 1,000 for 1, and later to 5,000 for 1. Virginia tried to stabilize the paper currency at 40 to 1, without success. The federal constitution barely escaped being wrecked on the issue of payment of debts. Creditors were of course for, and debtors against, a strong central government. (There is another way of stating this, rarely hinted at,—the poor man's side of the story). The federalists, who modestly referred to themselves as "the rich, the wise, and the good," carried the adoption of the constitution by a narrow margin. (I mean of course the first edition of the federalist party.) In 1818, the victory was still by no means certain; property and contracts were not yet safe. In the Dartmouth College case Marshall enforced one of the basic doctrines of his great constitutional and moral creed; he pronounced what **in form** was a judicial opinion, on a particular case, but **in fact** was a law,—An act to require people to fulfill their contracts faithfully and pay their just debts.

The learned writer of an admirable short biography of Marshall warns his readers not to regard the Dartmouth College opinion as entitled to rank with Marshall's greatest work; quoting Wordsworth, to whom a friend spoke of "The Happy Warrior" as being the greatest of his poems. "No," said Wordsworth, "you are mistaken; your judgment is affected by your moral approval of the lines."

§

The Dartmouth College case, as I have said, was decided in 1819. In less than ten years the Charles River Bridge case began, in the state courts of Massachusetts. A company had a franchise for a toll-bridge from Boston to Charlestown, with nearly thirty years to run, when the legislature chartered a new bridge, to be built a few rods away. It was admitted at the hearing in the United States Supreme Court, in 1837, that the new bridge, under the terms of the statute, was now free of tolls, and that the value of the franchise of the old bridge had by this means been entirely destroyed. Incidentally Harvard lost a thousand dollars a year, which it had been receiving in commutation of an ancient ferry-right. The proprietors of the old bridge stood on their charter, as a contract with the State. Webster made the argument for them. Nothing could be clearer, and Story had no doubt that the Dartmouth College decision governed.

But times had changed. In less than two years and a half, five places on the court had been filled by Andrew Jackson. Marshall had died in 1835, and had been succeeded by Taney. One judge stood with Story; the rest of the court upheld the right of the State to charter the new company. The majority opinion does not even mention the College case.

This was Taney's first constitutional opinion, and he struck a new note. "The object and end of all government," he said, "is to promote the happiness and prosperity of the community in which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created."

§

Story's position was pathetic. In 1845, he wrote sadly to a friend about the passing of the "old Court", and said that if Henry Clay had been elected, the previous year, he would have resigned, and let Clay fill his place. Disheartened by the calamity of the election of the Democrat Polk, Story decided to stay on the bench for a while, but (a curious point) to resign in time to give Polk the appointment of his successor. Did Story's mind turn back to Jefferson and John Adams, and have we here perhaps the obscure stirrings of an old Democratic conscience? Story died within a few months after writing this letter.

§

We have now come to the reign of a new king, the "police power." If you know exactly what the police power is, you are in an enviable position of superiority over lawyers and courts. All the definitions are contradictions in terms; they do not mark off a portion of the field, by limits, but they draw a line on an infinite surface, and leave more inside

the boundary than outside. When a city council, a State legislature, or congress itself wants to do a particular thing, and can find no specific authority for doing it, resort is invariably had to the doctrine of the police power. Zoning ordinances, child labor laws, housing laws, and laws conserving natural resources, regulating public service corporations, and restricting admission to professions and occupations, are all passed under the police power.

According to the Supreme Court of the United States, "The police power may be said in general to extend to all great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

This is plainly an elastic and perilous doctrine, difficult to reconcile with our firm adherence to the theory of a written Constitution. But it was the case we have been talking about that conferred on us the inestimable blessings of the police power doctrine, for the doctrine was invented to save the young and growing Republic, and its constituent States, from being strangled by the Dartmouth College decision.

§

Another line of defense was developed concurrently, one of the first effects of the College decision having been the adoption by the States of general laws reserving the right to amend charters of all future corporations. Massachusetts passed such a law as early as 1831. Our present State constitution has a provision that "no *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant or special privileges or immunities, shall be passed." It was under that reservation, executed by statute, that the recent amendment to the charter of the University of Chicago was made.

The great test of these so-called "reserved-power clauses" came when the now-powerful railroad corporations began to measure their strength against the States. A member of congress, in a public address, quoted from a quarterly review what he called "a striking paragraph," which ended with the sentence, "We have simply to make our choice between two alternatives,—either to let the State manage the railways, or let the railways manage the State,"—substantially the suggestion that has since been attributed to Debs; the man who actually proposed the dilemma, in 1873, can scarcely be dismissed as an agitator, for, seven or eight years afterwards, highly respectable people helped to make him president of the United States.

In the early seventies the railroads in the middle west were exceedingly unpopular with the farmers, and indeed with the public in general. The owners of railroads said, "the public be damned;" the employees were indescribably insolent: towns were made and unmade; rebates to favored shippers and bribery of public officers were two sides of the same story; "absentee landlordism,"—ownership in the east of western railroads,—was blamed for all this. The railroads sheltered themselves behind the Dartmouth College case, relying on their charters as contracts within the State, which the State could not impair by regulating either rates or service; they cited in addition the fourteenth amendment and the well-known provision of Magna Charta, referring all three authorities alike, for greater simplicity, to the commandment, "Thou Shalt Not Steal."

The Granger organization crystallized the sentiment against the railroads. The Grange was projected by a government clerk and founded in 1867 by seven men,—six government clerks and one fruit-grower. After it got well under way, it spread rapidly.

Wisconsin, under Granger leadership, passed a statute (the Potter Law) regulating railroad rates. The New York "Nation" advised investors to keep their money out of Wisconsin. (I believe I heard something very like this, only last summer,—about Wisconsin, too).

"We maintain," said the "Nation," "as we have maintained all along, that the principle of the Potter Law. . . is either confiscation, or if another phrase be more agreeable, the change of railroads from pieces of private property, owned and managed for the benefit of those who have invested their money in them, into eleemosynary or charitable corporations, managed not for the profit of the owners, but for the benefit of a particular class of applicants for outdoor relief—the farmers."

This was in 1874. Granger legislation in Illinois got an earlier start. In 1871 the first Illinois law for the regulation of railroad rates was declared unconstitutional by the State supreme court. Chief Justice Lawrence wrote the opinion, and it ended his judicial career. At the next election he was beaten by Alfred M. Craig. The "Nation" was furious. The newly elected judge, it said, "labors under the somewhat grave suspicion of having sold himself to the party he was running against, even before the vote was taken."

"No pretense is made," the "Nation" raved on, "that Craig is a better lawyer than his opponent or that he is a good lawyer at all. . . . This is a new stage . . . entered upon without disguise by one of the most intelligent communities in the Union—that, in short, which it is admitted on all hands two years ago adopted perhaps the best State constitution now in existence. . . . If the people of Illinois do not repent it, of course, it knocks the bottom out of their whole political system. . . . It renders the writ of habeas corpus and all the other guarantees of personal liberty of little or no value," etc., etc.; investors therefore should likewise keep out of Illinois. Judge Craig, it may be added, served the almost unprecedentedly long term of twenty-five years, with honor, and his son was afterwards elected to the supreme court.

The "Nation" demanded that the Granger legislation be taken forthwith before the United States Supreme Court; there, at least, our lives and property were safe. The "Nation" had its wish, and the Granger laws were taken to the Supreme Court, which declared them constitutional, partly under the reserved power clauses, partly under the police power. The leading case is *Munn v. Illinois*, involving the validity of a law of this State regulating grain warehouses.

When the sovereign states of Wisconsin and Illinois did not sue Lawrence Godkin and the "Nation" for libel, in the eighteen seventies, Mayor Thompson might have known that he could not succeed in his recent libel suits against the Chicago

papers for saying the city was broke and that its credit was bad.

Democracy is constantly disappointing its enemies as well as its friends. Less than a year ago (in December, 1922) Switzerland voted on a proposition to levy a property tax, which would have fallen entirely on 9 per cent of the population (that is, the rich). The proposition was overwhelmingly defeated at the polls—seven to one—in that country in the world which shows the nearest approach to pure democracy. Alison's famous prediction as to the exact date of the end of things in the United States may now perhaps be finally laid at rest.

The Granger movement in time shaded off into Populism and ultimately lost ground, but the Grangers, with all their faults, did at least one good thing—they boldly faced Garfield's dilemma and showed the country a way out—neither ownership of the railroads by the State nor ownership of the State by the railroads, but a recognition of the principle that the business of transportation, though in private hands, is affected with a public interest and therefore subject to regulation by the State as to rates and service.

A recent popular life of Webster says of the Dartmouth College case:

> The decision immediately became a cornerstone and foundation in American constitutional law. . . . The vast business operations of the whole continent have been built upon it. It has been not only all our institutions of learning and charity that have been saved from spoliation and Democratic jealousy, but our great railroad and steamboat systems and great enterprises of trade have been protected from the granger, populist, and socialist movements, which at times would have annihilated them. It may be true as is sometimes said, that it has in later times protected them too well. But that is a modern limitation, a modern problem to be solved. They had to be protected in the beginning or they could not have existed at all, and they are entitled at all times to a certain amount of stability and protection.

Truly a cautious conclusion, but you will find that every panegyric on the Dartmouth College decision necessarily ends on the same flat note.

(Concluded in next issue)

VISIT TO SULGRAVE MANOR, THE OLD HOME OF THE WASHINGTONS

Sir Charles Wakefield, in Address at Luncheon, Sets Forth the Aim and Spirit of the Sulgrave Movement for Preservation of the Manor as a Shrine of Two Nations—Finds Need for More Study of American History, Literature and Institutions in British Universities —Dean of St. Paul's, Judge Alton B. Parker, Solicitor General Slesser, Major Edgar B. Tolman Also Speak—Washington Relics Presented to Sulgrave—Old Pew Restored*

BETWEEN 400 and 500 members of the American Bar Association paid a visit to Sulgrave Manor as the guests of Sir Charles Wakefield and the Sulgrave Institution of Great Britain, of which he is treasurer.

The visitors traveled by special train from Euston to Northampton. Here they were welcomed by the civic and county authorities in the Guildhall and reminded that Lawrence Washington, the builder of Sulgrave Manor, was mayor of the town in the reign of Henry VIII. From Northampton the party were driven in motor-omnibuses through more than 20 miles of pleasant English countryside rich in historical associations, fine old mansions, and picturesque villages. A brief visit was paid to Althorp House, where the visitors were received by Lord and Lady Spencer, and shown over the famous collection of pictures. On arriving at Sulgrave Manor they were entertained at luncheon in a large tent in the grounds, and a number of speeches were made.

Mr. Charles E. Hughes, the American Secretary of State, who was unable to be present, wrote in a letter expressing his regret: "The action of the Sulgrave Institution in purchasing and maintaining Sulgrave Manor, the English home of the Washingtons, makes a strong appeal to American sentiment, giving us a more profound appreciation of our common tradition and of the riches of our inheritance, while at the same time evidencing the veneration in which the name of the foremost American patriot is held by the people of Great Britain. In the character of Washington our nations find an exemplar of integrity, wisdom, and the most unselfish patriotic devotion—an abiding inspiration to all who would serve their country. Time only enhances the fame of Washington, and we are drawn together by the realization that in truth he belongs to both peoples and illustrates what is best in both. I congratulate the Sulgrave Institution upon what it has accomplished and I trust that its beneficent labors may continue and may be most fruitful in strengthening the ties of our friendship."

Sir Charles Wakefield, in proposing the toast, "Our Guests," spoke as follows:

"My Lords, Your Worships, Ladies and Gentlemen: I rise with the utmost pleasure to give you the Toast of 'Our Guests.' We are proud to welcome the distinguished members of the American Bar Association and their friends at this historic old English home of the Washington family. Their presence here today affords the deepest satisfaction, particularly to those of us who are closely associated with the Sulgrave Movement in this country.

"I need not remind members of the legal profession of the value of 'tradition.' It is exemplified in our English habit—not only in matters of Constitutional law and practice, but in many phases of the national life—that of finding foundations for

*Account of the trip to Sulgrave, with exception of address of Sir Charles Wakefield, is from the London Times, issue of July 26, 1924.

our beliefs and ideals in precedents drawn from the long-buried story of the past.

"Here, Sulgrave Manor, revived and beautified, is one more example of the working of this ever-present motives. To us, it is not a dead fact that a Washington built this fine old Manor House, and that Washingtons lived in it from the time of our King Henry VIII to the reign of James I. In all that we have done in the preservation of Sulgrave Manor, we have endeavored to emphasize all that will appeal to the historic imagination of our visitors—being ourselves stimulated by that same appeal. When we bring our visitors to the front of the Manor House and show them the Tudor Porch, with the Royal Tudor Arms above it, and the arms of the Washington family carved in stone upon its doorway, we remind them that the noble Washington stock, which did so much towards the upbuilding of the United States of America, was deep-rooted in the life of this, our Mother Country, in times that are gone. There were Washingtons living here, within thirty miles of Shakespeare's home, throughout the whole of the great and glorious Elizabethan age. We feel that we can share your just pride in your national hero, and that you understand and share the sentiments that are enshrined within the walls of Sulgrave Manor.

"From the view-point of Sulgrave we view past history in the right perspective. We refuse, in the light of Sulgrave, to dwell upon the things which have separated and divided the British and American peoples in the past; for our hearts and minds are carried back to the fundamental things which unite. We see, now that the mists of long-dead passions have been dispelled, that in the clash of principles and personalities that resulted in an independent America, George Washington stood for British principles of Freedom and Justice. We see that it was our own statesmen—not all of them, happily—who blundered into a policy that ran counter to all our traditions.

Presentation of old Washington Pew to Sulgrave Church. Left to right: Rev. W. Packenham-Walsh, vicar; Mrs. Alton B. Parker, Sir Charles Wakefield.

"Sulgrave is very apt to our purposes as a shrine of union and concord between the American and British people. It is a standing reminder of our common origins, and also a standing challenge to us to strengthen the bonds of kinship and historic tradition, so that the harassed and perplexed world of today may be helped by our united strength and common impulse towards liberty and good government.

"It is not as antiquarians that we look to the past in this matter. The memories of the past inspire us for the great tasks of the future. That, as I understand it, is the meaning and message of Sulgrave. Our Movement believes in the power of symbols, and in the appeal to the imagination as a means of progress. In this spirit we have rescued and restored Sulgrave Manor; and, as the years go on, with the further help which we know we shall receive from those who understand our purpose and ideal, both in America and here, we intend greatly to add to its beauty and attractiveness. In the same spirit, with the powerful aid of the Dean of St. Paul's, whom we are so glad to have with us today, we have placed the effigy of Washington in the Crypt of St. Paul's, and the great St. Gaudens monument of Lincoln opposite Westminster Abbey. Thus, thanks to generous American donors, men who are two great landmarks in your path to nationhood are for ever honoured in the centre of our national life.

"The Sulgrave Movement has sought, too, to correct the shortcomings of our educational system, by emphasising the importance of a knowledge of American history, literature and institutions in our British Universities. We have been greatly helped in this matter by the most generous gift of another of our guests here today, Sir George Watson, who provided the means for establishing and endowing, in connection with our Movement, the first Chair of American History established in this country.

"Our time today is very limited, but I hope most of you who are strangers here will have time for at least a peep at the Manor House and its contents; and that, having once visited this historic spot, you will never again feel strangers, but will realise that this place is your heritage as well as ours, and that its future must be our joint care. We sincerely hope that this day at Sulgrave Manor will give you all pleasure, and that, even amidst the many wonderful experiences you will have had in your visit to the Old Country, it will long remain in your memories. We hope that the ideal which inspires our work here will take firm possession of you. We are glad to have had this opportunity of saying something about the purpose and achievement of our Movement before some of the distinguished members of the great legal profession in the United States.

"There is an eloquence in the very stones of an historic building such as this. The shades of departed Washingtons may be with us today. And those spirits would give their blessing to the welcome which we offer you today; rejoicing that from them sprang the seed that gave to America in the hour of her birth as a nation the great leader whose memory we also treasure; rejoicing, too, in the larger wisdom that is no doubt theirs, in the splendour and power for good of the great Republic that

Sulgrave Manor, from a painting in possession of Hon. George Harvey, former American Ambassador to Great Britain.

Washington set upon the road to its present greatness.

"May I be forgiven a final word? My own pleasure in proposing this Toast is enhanced by my memories of the kindness with which I was received in the course of my recent 'embassy of friendship' on the other side. Neither I, nor the colleagues who accompanied me, will ever forget the magnificent welcome you gave us throughout our journey.

"Therefore, with all the emphasis at my command, I give you, ladies and gentlemen, the Toast of 'Our Guests.'"

The Dean of St. Paul's, supporting the toast, said that the history of the American nation began only 150 years ago; but the history of the American people went back as far as King Alfred, who was known to have many hundreds of thousands of lineal descendants in America today. (Laughter.) It gave English people extreme pleasure when Americans said they felt at home in England, not only because we were delighted to see them, but because we felt that the future preservation of the traditions which we valued must be largely in the hands of the American Republic. He was not going to say anything pessimistic about his own country. There was life in the old dog yet. (Laughter.) But the future must be mainly in the hands of the country that had millions of square miles.

The Solicitor-General (Sir H. Slesser) said that the other day a knotty point was being discussed before the Privy Council about Irish boundaries, and a large part of the ammunition was derived from decisions of the American Courts. He believed American lawyers in legal argument also made use of decisions of our Common Law Courts and Courts of Equity. We lived in critical times, and it might be that the great opportunities which offered themselves for the restoration of peace would be lost. The finger of destiny pointed to the English people here and in America as agents to do the great work of abolishing hatred, suspicion, and war. (Cheers.)

Judge Parker, responding, said they were all agreed in not wanting any more war. He believed they would agree, too, that they were willing to take any reasonable step to prevent it. If the English-speaking peoples worked together for peace, he believed they would be strong enough to keep off war for a considerable time. The British and American peoples understood and trusted one another. (Cheers.) The American visitors to this country had been given the finest treat they had ever had, and if they had a chance they were going to pay it back. (Cheers.)

Major Edgar Tolman said that when English visitors went to America they would find that Americans would throw open to them their homes and their hearts.

Mrs. Parker formally presented to Sulgrave Manor a number of objects given by various donors. They included the original grant of the manor and lands of Sulgrave, witnessed by Lawrence Washington and other members of the same family; a handle from the coffin of George Washington; a section of the old Washington elm from Cambridge, Massachusetts; seven framed pictures of Mount Vernon; a liquor chest which belonged to George Washington; and saddlebags which he used in the revolutionary war. Mrs. Parker said that the Colonial Dames had recently raised $100,000 for Sulgrave Manor, and other women's organizations in America were active on its behalf.

Mrs. T. C. Mills delivered the greetings of the Society of the Daughters of the Revolution, and presented a flag to the institution as a token of their good will and confidence.

Washington Pew Restored

During the afternoon the Washington pew, which was formerly in Sulgrave Church, but was sold and taken away 40 years ago, was restored to it by Sir Charles Wakefield, into whose possession it recently came. The vicar of Sulgrave, the Rev. W. Pakenham-Walsh, accepted the gift on behalf of the church, and the Dean of St. Paul's offered a prayer of dedication.

Mrs. Victoria Woodhull-Martin, whose prompt action secured Sulgrave Manor for the cause of Anglo-American friendship, to which she has devoted so much of her life, was unable to be present, but was represented by Mr. R. Holland-Martin.

The Self-Governing Bar

"This is not a new thing. In three states this power has been conferred upon the legal profession. In North Dakota, Idaho and Alabama every lawyer must be a member of the organization of the bar created by statute and subject to its discipline. At the legislative sessions in 1925 measures will be introduced in a dozen other states carrying similar provisions.

"The California Bar Association proposes to present to the Legislature when it meets in January a bill that has been under consideration for two years that will place control of the bar in the hands of the bar itself. Nor is this a new thing in this State. A measure of similar import, formulated by the Bar Association of San Francisco, was presented to the Legislature in 1921, but did not get out of committee.

"Similar control of the medical profession has proven salutary. In Great Britain, France, Canada and in other jurisdictions, the bar controls the admission, discipline and disbarment of its members. That should be the rule in the United States and every lawyer should give his hearty support to the measure that will make this possible in California, to the end that the prestige and influence of the bar may be increased and its reputation enhanced in the minds of the people."—*The Recorder* (San Francisco).

AMERICAN LAWYERS CORDIALLY RECEIVED IN SCOTLAND AND IRELAND

Presented by Dean of Faculty of Advocates to Lords Justices in Parliament House, Edinburgh —Lord Justice-General Points Out Interesting Juridical Distinctions Between Scotch and Common Law Systems—Luncheon by Corporation and Reception by Scottish Legal Societies—Visitors Attend Governor-General's Garden Party in Dublin—Banquet by Benchers of King's Inns—Garden Party at Muckross Abbey —Other Entertainments*

MEMBERS of the American and Canadian Bar Associations arrived in Edinburgh on July 29, over the week-end, and at a number of functions yesterday they were cordially received on behalf of the legal profession of Scotland, and by the Lord Provost on behalf of the citizens of Edinburgh. At noon a deputation attended at Parliament House to meet a number of the Judges of the Court of Session, and the visitors were afterwards entertained by the Corporation to lunch in the City Chambers. In the course of the day opportunity was taken of visiting places of interest in and around the city. Under the guidance of Mr. J. Wilson Paterson, H.M. Office of Works, and Mr. J. Inglis Ker, F.S.A. (Scot.), a large party was conducted over Holyrood Palace and the Castle, while visits were also paid by motor to the Forth Bridge and also to Linlithgow Palace, where they were received by Provost Hebson and the Magistrates, the visitors being afterwards entertained to tea in the Masonic Hall. In the evening they were the guests of the various Scottish law societies at a reception held in Parliament House.

At Parliament House

The deputation which visited the Parliament House at noon consisted of the Hon. Frederick W. Sims, Chief Judge of the Supreme Court of Virginia; Mr. Charles Martindale, American Bar Association; Sir James Aikins, President of the Canadian Bar Association; Mr. Justice Mignault, Supreme Court, Quebec; the Hon. R. W. Craig, Attorney-General of Manitoba; Mr. T. Newlands, Canadian Bar Association; Mr. G. Bryan, President of the English-Speaking Union of Virginia; Col. H. L. Stimson, American Bar Association, former Secretary for War of the United States.

They were conducted to the Judges' robing-room and introduced to the Judges of the Court of Session, who wore their scarlet Judiciary robes and full-bottomed wigs, by the Dean of Faculty (Mr. J. C. Condie Sandeman, K.C.), who headed a large representation of the Scottish Bar. The Judges present were the Lord Justice-General (Lord Clyde), the Lord Justice-Clerk (Lord Alness), Lord Sands, Lord Ashmore, Lord Morison, and Lord Constable. In addition to the Dean of Faculty, the Bar was represented by the Lord Advocate (Mr. H. P. Macmillan, K.C.), the Solicitor-General (Mr. J. C. Fenton, K.C.), the Vice-Dean (Mr. C. H. Brown, K.C.), the Keeper of the Advocates' Library (Mr. W. K. Dickson, LL.D.), Mr. J. Roberton Christie, K.C.; Mr. Morrice Mackay, K.C.; Mr. J. L. Wark, K.C.; Mr. T. A. Gentles, K.C.; Mr. D. Jameson, Mr. D. R. Scott, Mr. T. Innes, Mr. R. G. Wallace, Mr. J. B. Young, Mr. James Macdonald, Mr. A. R. Brown, Mr. A. H. D. Gillies, Mr. J. Macgregor, Mr. J. A R. Mackinnon, and Mr. N. MacLean.

The Dean of Faculty said he had great pleasure in presenting his distinguished friends. They had come a long way, and entirely out of goodwill to this country.

Scottish Patriotism

The Lord Justice-General said the Dean had given him a great opportunity to offer on behalf of his brethren of the Court of Session and on behalf of the wider number of his brethren of the College of Justice a right hearty welcome to this country and its law courts. They were proud, and rightly proud, of the great continent which between them they had made their common country; prouder still of the vast monument of human progress and civilization which they had built in its midst. In Scotland they were sharers in that pride. The visitors found themselves in the metropolitan centre of a Motherland which was small indeed by comparison but not all the volume of love of Americans for the land they fought for and won, not all the devotion of Canadians for the Dominion which they had made so great and powerful, exceeded in depth and width the passion which Scotsmen felt for the small Motherland which gave them birth. He was sure that they who knew something of his countrymen in their homes did not visit this little Motherland with hearts altogether unmoved, for they were in the home, or one of the homes, of the great race which was theirs and ours, and they were lingering for a moment near the fountain-head, or one of the fountain-heads, of British and American nationality alike.

Juridical Distinctions

The Lord Justice-General proceeded to say that they had their distinctions in Scotland from the system of jurisprudence which they enjoyed south of the Border, and from the systems with which they themselves were particularly familiar. But these distinctions were not deep enough to destroy the essential unity which they all possessed. In Scotland their judicial systems were framed essentially on French models. Their very College of Justice was supposed to have a mysterious connection with the Parliament of Paris. However that might be, all their institutions were directly influenced by French examples. They knew the ancient alliance between the Kings of Scotland and the Emperors and Kings of France was only the outer symbol of the real affinity between the sep-

*Account of visit of American lawyers to Scotland is taken verbatim from the Scotsman (Edinburgh), issue of July 29, 1924. We are indebted to the editors of the Freeman's Journal and the Irish Times, both of Dublin, for copies of their newspapers containing an account of the visit of the American lawyers to Ireland.

arate populations of these countries. The College of Justice had continued in its main features unchanged for four centuries, since it was instituted. It had suffered, no doubt, many alterations, but its main framework was what it was when James V. made it in 1532. It had sat a few feet away from that room; it had sat sometimes in St. Giles' Cathedral; it sometimes sat in the Tolbooth, now removed, and whose site was marked by the Heart of Midlothian in the pavement; and it had sat for many years in the ancient Parliament Hall. All those days it had been at the same eternal task which filled their days also—the task of hammering out the principles which were common to them all, some general system of right, into which they could fix the vast complexity of modern life.

The Democratic Tendency

The Lord Advocate, in associating himself with the greetings offered by the Lord Justice-General, said he was charged by the Secretary for Scotland to convey to them his most hearty welcome to Scotland. He was not able to be present owing to other engagements. Proceeding, Mr. Macmillan said that those who were at Westminster recently would notice that they were now introduced to the Court, not by a Law Officer of the Crown, but by the head of the Faculty—a very interesting difference between the organizations in Scotland and England. The head of their profession in Scotland was elected by themselves, and in that respect they illustrated not only the democratic tendency of their country, but also preserved an interesting feature of their association with France, because the Dean represented the doyen of the French Bar. The Dean carried as his signal a black stick or baton, from which came the name, batonnier, of the French Bar. He hoped they would find much to interest them in the Court of Session. An interesting feature was the association of the Law Courts with a great library. He thought he might claim for the Court of Session that there was no Court in the world which had at its disposal so magnificent a collection not only of technical books, but of books of general literature and science. In the Library there was a service provided for the Courts which was unique.

They would, of course, think of the many historic associations which centered in Parliament House. They would see in the Library the very seat in which Sir Walter Scott sat when a clerk of Session. They would think of Jeffrey and other great advocates, and of R. L. Stevenson, a more recent and more distinguished name in some ways, but whose distinction certainly did not lie in the sphere of law, but in more romantic directions. They would think also of the great system of law that had developed there. In Scotland they prided themselves on the great civil law of Rome, although no doubt it had been developed, and the original phases of the Roman law were disappearing. They prided themselves upon another feature which might be of interest. They had also relied more on principle than precedent, and that was due to the fact that the literature of law in Scotland had been enriched by the works of great institutional writers, like Stair, Erskine, and Bell, whose works found no counterpart in any other system in the world. He tendered a most hearty and cordial welcome on behalf of himself, as representing the King, and on behalf of his colleagues.

"A Triple Cord"

The Hon. F. W. Sims, representing the United States Bench, said that the welcome from the Bench and Bar of England and of their Lordships had woven a triple cord that would bind them together as brothers, and which, he was confident, would never be broken.

Mr. Charles Martindale replied on behalf of the American Bar Association. He said that from childhood it had been his delight to read of the Scots and of the bravery, hardihood, endurance, and faithfulness of the Scottish race on many occasions and on many fields, that had taught them how to live like gentlemen and how to die like gentlemen. He expressed his thanks for the welcome they had received and the hope that the emotions which arose on an occasion like this would have their fruition in a better understanding between the great country he represented and this historic land.

Mr. Justice Mignault, in reply for the Bench of Canada, said the city of Edinburgh required no introduction to the lover of history and the lover of romance. It was enshrined in a halo which rendered it in a way one of the most sacred spots of Scotland and also of the world. As to their welcome to the sanctuary of Justice, Parliament House, they were deeply impressed with the services which their Lordships and their predecessors had rendered to the cause of jurisprudence.

The Hon. R. W. Craig, replying on behalf of the Canadian law officers, expressed the pride of Canadians in the traditions of the Scottish race. When one set foot in those historic places, he said, one's heart warmed and thrilled to all the recollections of what one learned at his mother's knee. The welcome they had received would always be a source of inspiration to them in the duties they might be called upon to perform in the years to come.

Sir James Aikins, who also replied, said the objects of the American and Canadian Bar Associations were shortly these—to advance the science of jurisprudence, to advance the administration of the law and the uniformity of the law consistent, of course, with the basic existence of the code in Canada and in the United States; to uphold respect for the Bench and the honor of the Bar; and to encourage good fellowship among members of the profession. In following out the principle of unity, which was the idea of the foundation of the Associations, they desired to get in touch with the Bench and Bar of Great Britain, and they had succeeded in that. After referring to the visits to America of Lords Shaw and Finlay, Sir James Aikins proceeded to say that their profession had a great tradition. He thought it was the greatest profession. The distinction between it and trade was that their main object was service; the object of trade was gain. The real association of the nations was between the United States and the British Empire—perhaps he ought to say, the affiliation of the nations of the British Empire with the United States. Kinsmen they all were, not perhaps because of blood, but because they were joint heirs of the greatest glory that history had ever chronicled of any people.

Luncheon by Corporation

There was a large and representative gathering at the luncheon given by the corporation in the city chambers. Lord Provost Sir William Sleigh pre-

sided and proposed the toast, "Our Guests," in a very happy manner. Col. Stimson, replying for the American Bar Association, paid a glowing tribute to Scotland. Mr. Harcourt, of Osgoode Hall, Ontario, replied for the Candian lawyers. Lord Clyde proposed the health of the Lord Provost. The proceedings were terminated with the singing of "Auld Lang Syne."

Reception at Parliament House

In the evening a reception in honor of the visiting Bar Associations was given by the Scottish legal societies in Parliament House. The company numbered nearly a thousand, and, besides the representatives of those engaged in the practice of the law in America, Canada, and Scotland, there were present prominent members of other professions and members of the Town Council. Parliament Hall, the Advocates' Library, the Signet Hall and Library, and the S.S.C. Library were all made use of for the occasion, and in the various corridors there were tasteful floral decorations. The Scottish legal societies represented were the Faculty of Advocates, the Writers to the Signet, the Solicitors in the Supreme Courts, the Procurators of Glasgow and Procurators of Dundee, the Aberdeen Advocates, and the Incorporated Law Society. The guests were received by the Dean of Faculty (Mr. Condie Sandeman, K.C.); Sir George M. Paul, Deputy Keeper of the Signet; Mr. W. H. Mill, President of the S.S.C. Society; Mr. F. W. Kay, Aberdeen; Mr. C. Duncan, Dundee; and Mr. J. Paterson, Paisley. Programs of music were carried through in the Signet Library and the S.S.C. Library, where also refreshments were served. Pipe music was supplied by the band of the K.O.S.B.'s from Redford Barracks, in Parliament Hall. The guests availed themselves of the opportunity of visiting the Courtrooms and of inspecting the main hall and the various objects of interest in the several libraries in all of which much interest was displayed.

The Visit to Ireland

ABOUT two hundred American and Canadian lawyers accepted the invitation of the Irish Bar to visit that country at the conclusion of the London meeting. The estimate of the attendance is given by an American who went, and the figures are just about double the registration in London of intending visitors. Dublin had therefore somewhat the experience of London and Paris, the number of guests outrunning the number of acceptances. But all were cordially received and most agreeably entertained, and the visitors returned with high appreciation of the hospitality of the Irish Bar, which, in the words of one, left nothing to be desired. The largest contingent of visitors naturally came from New York, but every section of the country was well represented in the delegation which left Euston Station, London, on Tuesday, July 29, and arrived at Dublin the next morning.

The first function was a garden party at the Vice-Regal Lodge, Dublin, at four o'clock of the afternoon of the day of arrival. Governor General Healy, standing in the portico of the Lodge, shook hands with the numerous visitors and bade them welcome. As the Governor General is a lawyer himself as well as an official, his greetings had both a professional and official character. The list of those present which appears in the *Freeman's Journal* of July 31 shows that a large number of the most distinguished citizens of the Irish capital gathered to meet the representatives of the American and Canadian Bars. The No. 1 Army Band furnished music for the occasion.

In the evening there was a dinner at the King's Inns, given by the Benchers of the Honorable Society of the King's Inns. The function was greatly enjoyed by all present, and there was plenty of interesting conversation. The speeches, however, were few in number and very brief, the principal ones being the address of welcome by the Chief Justice and the reply on behalf of the American guests by Judge Alton B. Parker of New York. The following account is taken from the *Freeman's Journal*:

"In the evening the American visitors were the guests of the Benchers of the King's Inns at a dinner given at the Inns. A distinguished gathering at the function included the Governor-General, Mr. Hugh Kennedy, Chief Justice of the Saorstat, who presided, briefly welcomed the guests.

"After dinner the visitors were entertained to a vocal and instrumental program of Irish music, including folk songs. The artistes were Miss Jean Nolan and Mr. Jos. O'Neill, the well-known Dublin vocalists, and Miss O'Hara, violinist. Dr. J. T. Larchet acted as accompanist.

"During the evening the doors were opened and the party remained standing while the band of the Civic Guard outside played 'The Star-Spangled Banner' and 'The Maple Leaf' in compliment to the visitors. Among the Canadian guests were Sir James Aikin, Lieutenant-Governor of Manitoba, Lord Chief Justice Harvey, and the Hon. Mr. Rowell, ex-President of the Canadian Privy Council.

"The attendance included—The Governor-General, Mr. K. O'Higgins (Minister for Justice), Lord Glenavy (Chairman of the Seanad), the Right Hon. T. F. Molony (former Lord Chief Justice), the Right Hon. W. H. Dodd and the Right Hon. A. W. Samuels (former Judges of the High Court), Mr. James Moore (President of the Incorporated Law Society), and leading members of Irish legal profession."

On Thursday morning a special train, carrying a goodly number of the guests, left Dublin at nine o'clock for Killarney. The program of entertainment at this fascinating place, with all its natural beauties, included a concert in the evening of Thursday, at which the Governor-General was to be present, and John McCormack was scheduled to sing; a garden party at Muckross Abbey and a gala ball in Killarney on Friday; a regatta on the lower lake on Saturday, and a golf tournament for devotees of the game on the following day.

The visit to Ireland afforded the guests an opportunity not only to become acquainted with Irish hospitality, but also to get at first hand information and impressions as to the new constitutional and judicial system so recently established in that country. Many of the guests were deeply interested in the subject and availed themselves fully of the occasion.

Contributions

The articles contributed to the Journal are all signed with the names or initials of their authors, and no responsibility is assumed for the opinions expressed therein.

THE VERACIOUS LOG OF THE LONDON FLEET

Nearly Nine Hundred Lawyers and Ladies Brave Unknown Seas on Berengaria, a Small Ship of Only 52,000 Tons—Twelve-Mile Limit a Spectacular Disappointment—Interesting Contest Aboard—Message from Canadian Bar President—Seven "Crowded Days of Glorious Life" on the Laconia, Day by Day—A Get-Together Meeting —Session of Court at Which Lady Barristers Take Milk Instead of Silk —Some Account of the Lost Log of the Aquitania

The Berengaria

SATURDAY, July 12.—There she is, the "Berengaria," once named the "Imperator," now called after the wife of a distinguished gentleman of old time, thus retaining unimpaired the suggestion of command. From 11:00 a. m. to 5:00 p. m. hurry and bustle of arriving lawyers and their wives, etc. All arrive with anxious, expectant faces. Will their baggage be there as predicted? It will. It is. Many affecting reunions with luggage.

At last the command, "All visitors ashore!" At 5:06 p. m. N. Y. S. T., the ship is under way, ably assisted by several small but energetic tugs. We use the letters "N. Y. S. T." designedly, instead of the full words. One going to England must familiarize himself with rows of capital letters at the end of things. Few distinguished men on the other side appear in public without a trail of capital letters behind them—K. C. M. G., K. C. M. P., or something of the kind.

Standing on deck and watching the great buildings of Manhattan sink to vague outlines, noting Governor's Island, the Statue of Liberty, the Long Island shore line, and other details of the course to sea. Many speak of the twelve-mile limit and their desire to see the great fleet of rum smugglers lined up as far as the eye can reach, waiting for a moment's relaxation of vigilance on the part of our gallant tars in order to break through and land their cargoes. Perhaps a conflict with the lee scuppers running red with Burgundy. Disappointment. Only a few boats visible anywhere in the region, and they may be on thoroughly legal business, as far as anyone can judge.

Many set about learning something of the flagship of the American fleet. Somewhere in the vast expanse of sea—"expense of sea," someone called it on the trip—the "Nina" and the "Pinta," in other words, the "Laconia" and the "Aquitania," are battling the unknown seas to arrive at the same goal. The men on the "Berengaria" learn that the ship is well over 900 feet in length, with a gross tonnage of 52,226, while the ladies soon discover that the following charges have been authorized: Marcel waving, 4/; waving and curling, 5/; facial massage vibro, 5/, etc. Whatever the inclined line to the right of the figures may mean, it is quite clear to them that the charges are very reasonable indeed, all things considered; in fact, without considering more than half of them. It is also learned that the ship has eight decks, elevators, a magnificent salon lounge, a Pompeiian swimming pool, a palm garden, a large ballroom, a bank, gymnasium, immense promenade decks, religious services on Sunday, orchestra, a Tudor smoking room, a bar, a daily newspaper, and almost everything you might mention.

Dinner at six. A long and elaborate ménu containing about everything one could think of. Elaborate mênus at sea often don't mean anything; it all depends on the weather. If the weather is bad, such a ménu is a deadly affront. But the "Berengaria" appears resolved to do its duty and risk the consequences.

Meeting of old acquaintances, making of new acquaintances, much promenading on decks, dancing for those who like to dance. The first evening wears away. Before it is done the passenger list has become a house party.

Well known judges and lawyers take constitutionals on deck. Two or three of the younger members of the Bar take unconstitutionals in the smoking room.

At 8:11 p. m. N. Y. S. T., Ambrose Light Vessel abeam.

Sunday, July 13.—Fire drill in the morning. Must not be confused with Sunday services. Passengers appear with life-belts and learn how to save themselves a lot of swimming. Roman Catholic services in the Palm Room and Church of England services in the Lounge. Mr. S. Benyon, Purser, reads the latter service in a careful, well modulated voice so as to cause no alarm. You can't be too careful not to start a panic on ship-board. Singing by well-trained ship's choir, in which passengers join. A prayer for the safety of those on land. The hymn "Holy, Holy, Holy," floats out and seems to mix with the murmurs of the sea in one vast ascription of praise.

Warnings that "professional confidence men" are reported to cross the Atlantic from time to time attract attention. Most of the passengers are themselves the repositories of much "professional confidence." Distinction at last made clear. No reflection intended on passengers.

Moderate to light breeze and sea. Weather slightly cloudy, then fine and clear; 367 miles up to Sunday noon. Boat steady. The advertisements call it "the floating Ritz." It is very like a hotel, except that there seems less vibration.

Monday, July 14.—Message on the bulletin board: "To R. E. L. Saner: My warm thanks for your message. I greatly regret I cannot be with you. Please convey my best wishes to the many learned brethren who are fortunate enough to be on board. (Signed) John W. Davis."

Wireless from S. S. "Montlaurier": "Canadian Bar Association wishes American Bar Association pleasant voyage and happy arrival in England. (Signed) Aikins, President."

"President Canadian Bar Association, S. S. 'Montlaurier': American Bar Association cordially appreciates message of Canadian Bar Association

and sends fraternal greetings and best wishes. (Signed) Hughes."

Reported that Mr. John D. Black and certain members of Chicago Bar Association Glee Club are threatening to sing; probably cannot be restrained much longer. Deemed best to have it done under circumstances permitting some sort of official control. Performance given in main dining room on F. Deck, Mr. Silas Strawn of Chicago, master of ceremonies. Songs printed and audience joins heartily, particularly in the solemn and affecting chorus:

"Caveat emptor, quare clausum fregit,
Obiter dictum, damnum ex delicto,
Malum prohibitum, locus penitentiæ,
Res ipsa loquitur."

"Does the Spearmint Lose Its Flavor on the Bedpost Overnight?" another touching little song, rendered with excellent effect by song leader and audience.

Strong breeze, moderate sea, overcast, occasional rain squalls. Certain ladies insist on seeing ice-bergs, apparently under the impression that their tickets call for ice-bergs. Ship's officers look at them sadly and say nothing. Member of party who had intended to remark on deck, in case of rough weather and the ship rolling, "melior est conditio sedentis," abandons hope of utilizing jest. Confides to friend, however, that he is looking forward to an opportunity to say, when someone remarks that the pump has long since disappeared from Pump Court, Middle Temple:

"Lo, all our Pump of yesterday
Is one with Nineveh and Tyre."

Date of taking Bastile. One or two Francophiles celebrate by taking Bass, following *cy pres* lines. 574 miles.

Tuesday, July 15.—Eight round contest in the evening between Dean Roscoe Pound, of Harvard University Law School, and ship's foghorn. Lounge is crowded for the event, and ringside seats are in great demand, although few know there is to be anything except an address by Mr. Pound on "Legal Institutions as They Are and as We Shall See Them," as a preparation for London meeting. Scarcely has he been introduced, however, and begun speaking before the foghorn swings into action and contest is on.

Round 1.—Mr. Pound leads off with a few humorous remarks. Foghorn counters by blowing long and deafeningly. Seizing an opening of silence, speaker follows up his first remarks with a quick thrust at the subject. Foghorn comes back without showing weakness. Both contestants seek opening. Honors even.

Up to seventh round much doubt as to which will get decision. During the eighth it becomes plain the distinguished speaker is entitled to it on following points: Good humor, self-possession, persistency, willingness to make the best of a bad occasion. His remarks are greatly enjoyed. Foghorn afterwards reported as saying, "I am glad the championship remains in America."

Notices on bulletin board of dinners or lunches for Harvard University men, Ohio University men, D. K. E. and other organizations. Notices on same board calling for meetings of all members of the Ku Klux Klan and of all attorneys from Philippines and Porto Rico and Guam aboard ship suspected to be intended as jests.

Moderate breeze and sea, overcast, clear, cloudy, poor visibility. 555 miles.

Wednesday, July 16.—Reception in the salon lounge to President Hughes and Mrs. Hughes. Grew out of suggestion by five former Presidents of the Association who are aboard—Rawle, Dickinson, Lehmann, Parker and Saner—that members would enjoy such a function. Largely attended and greatly enjoyed. Many express view that if all receivers were equally cordial, it would work a great improvement in one phase of legal business.

Followed by dancing in the ballroom. All functions, it may be remarked incidentally, are followed or preceded or accompanied by dancing in the ballroom. Intervals filled up by concerts. Many remarkable instances of rejuvenation witnessed, serious middle-aged gentlemen suddenly discovering they are quite young and proving it by agility on the dancing floor. Paul Specht's Carolina Club orchestra, with full complement of Anglo-saxophones, furnishes musical explosions.

Moderate breeze and sea, misty, overcast, fresh breeze, cloudy. 451 miles.

Thursday, July 17.—Entertainment in aid of British and American Seamen's Institutions in the salon lounge at 9:00 p. m. Hon. Charles E. Hughes, chairman. Fine musical program, made up by volunteers from passengers, ship's orchestra, the dance orchestra, and ship's officers. A "Twelve Mile Phantasy," poem specially composed for the occasion and doubtless so called because it was the limit, read and much applauded. Mr. Hughes makes address, paying tribute to the race of seafarers in general and the officers and crew of the flag-ship in particular. Collection, "The Star-Spangled Banner," "God Save the King."

Moderate to fresh breeze and sea, moderate swell, overcast, cloudy. 540 miles.

Friday, July 18.—California, Virginia and other State groups have photographs taken for benefit of posterity. Various excursions by groups to engine rooms, kitchens and other penetralia of ship. Much enjoyed by excursionists. No report as to feelings of engineers, chefs, etc.

Run on bank by passengers to stock up on English money preparatory to landing next day. Discussion between two passengers in waiting line as to difference between the pound and the guinea. One of them ventures sage observation that the pound represents the democratic, and the guinea the aristocratic element in English currency. "But there isn't so much difference between them," the other protests, "only a shilling." "Possibly there isn't as much difference as you think between the aristocratic and the democratic element either," the other replied.

Suspicion that England is destination of "Berengaria" confirmed by report that ship will arrive at Cherbourg early in the evening and at Southampton about two in the morning of Saturday. Realization that voyage is nearly over causes regret, in spite of agreeable anticipations of visit. Many expressions of satisfaction with extremely successful efforts of officers and crew to make the voyage pleasant, Captain W. R. D. Irvine, Staff Captain R. D. Jones, Purser S. Benyon, Chief Engineer R. Lambert, St. Ch. Engineer A. Duncan, Chief Steward W. Ballyn, Chief Officers G. R. Dolphin, Second

Purser W. D. Brown, Assistant Purser H. B. Ward, all thanked for conducting the voyage so smoothly and successfully that it was not necessary for passengers to resort to any appreciable extent to the efficient services of Surgeon J. D. Doherty and Assistant Surgeon G. A. Goolden.

Arrive Cherbourg Breakwater at 7:54 p. m. G. M. T. Leave Cherbourg 11:00 p. m. B. S. T. Moderate breeze and sea, overcast, cloudy, fine and clear. Take your choice. That is the official ship's log. 542 miles up to noon and 186 miles to Cherbourg Breakwater.

Saturday, July 19.—Hurry and bustle of landing. Custom-house officials strangely reasonable and expeditious. Special trains waiting to carry party of nearly 889 American lawyers and ladies to London. Cherbourg to Nab Tower, 65 miles. Average speed on voyage, 23.35 knots. Ambrose Channel Lightship to Cherbourg, 5 days, 19 hours, 43 minutes. Cherbourg to Nab Tower, 2 hours, 37 minutes.

N. B. Please report any accuracies in the Log of the Berengaria. Correction will be gladly made.

The Laconia

SHORTLY before one o'clock, Daylight Time, to-wit, nine seconds prior thereto, on Friday, July 11, 1924, certain figures might have been seen dashing over the gangplank of a ship making ready to sail. Their lateness and the way they mussed papers about showed they were lawyers. The ship was none other than the "Laconia," third in size, but first in everything else, of the American Bar Association fleet, bound for London. Near by lay the "Berengaria," which, having landed its most distinguished passenger, the racehorse Epinard, had accomplished the real object of its voyage and was obliged perforce to take on some passengers for the return trip east. The "Aquitania" had already sailed by Daylight Time and, fortunately for us, had therefore left behind some who reckoned by Standard Time and joined our company sans baggage, sans everything but good nature.

As we cast off, vari-colored rolls of paper ribbons thrown to waiting friends on shore held fast to land as long as might be. A large banner with the legend "Bon Voyage American Bar Association" flown on the pier end cheered us as we swung out into the river. The ship blew its whistle and those leaving wives on shore blew their noses as long as visible, then philosophically went below to stoke up while the boat was on even keel, and to put in the time until twelve miles should have been traversed.

A little way out we had life saving drill. "Is that the Woolsack the Lord Chancellor sits on?" asked a small passenger as Papa Buzfus adjusted the Boddy Finch. "No, dear; father is doing afloat what he does on shore. That is to say—putting on a front." Instruction was given by Chief Officer Robinson, holder of the Distinguished Service Order and, like our Captain Britten, marked by a Royal Distinction. We felt safe, therefore. If we had been royalty, all the officers and all the crew would also have been honored, for a finer, more agreeable and more efficient personnel could not be found on the seven seas. Purser Cartwright was a very Cæsar for versatility; having tripped a very light fantastic at the dance the first night (no reference to any particular person intended) some passengers feared he might jingle out of his pockets some of their valuables in the abandon of the fox-trot. But when, given an advowson, they heard him read part of the service on Sunday morning, they were reassured and would have entrusted to his care anything save their women folks. But of him more anon.

Every detail was arranged for our comfort except the intervals between meals and broth and tea and sandwiches. These were too brief for real hunger. Even the matches in the smoking room (nothing personal meant) were a joy—young trees that burned until you got your light or were lighted up, as the case might be. The constant swabbing and painting-up of the ship were the envy of the housekeepers aboard.

Once on "the wine-dark sea," as sapient Homer called it, legal lingo floated on the breeze; the writ of Prohibition was not used and *procedendo* was invoked only by those having the high numbers in the pool; stories were laid with a *continuando* and none enjoined. It was once around the ship and then a *venire facias de novo*. We were glad indeed our bark was not of the White Star Line; else she would have been not the "Laconia" but the "Laconic." An over-speaking judge may be no well tuned cymbal, but a laconic lawyer on the high seas is something whereof the memory of man knoweth not.

Some now discovered the Gymnasium (and undreamed of muscle in consequence), the horse and Charlie horse and many games, as, e. g., deck tennis, polo, ring toss, shuffleboard, but, outside of the gym, no dumb bells. Some persisted in the more quiet exercises of lifting the glass and raising the ante.

Some learned nautical terms, as "abaft the binnacle" and to distinguish "davit" from "affidavit"; also port from claret.

Saturday, July 12.—The sun warm, the sea smooth. The official program of the London Meeting was released, the following conversation overhead: "What shall I do for a morning coat—have lost mine. I pushed it in the closet last night after coming from the smokeroom." "Where's the closet?" "There" (pointing to a porthole).

8:30 p. m.—A coram nobis get-together meeting in the Lounge, initiated by J. W. Vandervort of Parkersburg, W. Va., who presented the Chairman of the meeting, Reginald H. Smith of Boston, generalissimo, Admirable Crichton, pinch hitter and general utility man.

Mr. Smith said everyone knew the name of Columbus' ship, the "Santa Maria" (cheers), but few remembered the "Nina" and the "Pinta." Mr. Smith, as chief assistant to the Captain, therefore announced the appointment of the Official Keeper of the Log for our ship and asked him to show himself. At this point a tall, handsome gentleman of irreproachable manner and with a searchlight eye arose (I'm writing this thing) and bowed to the assembly. With customary esprit d'escalier he would have said, "I should have preferred to keep the lager rather than the log," but, as he was not called on, this frothy sentiment remained unspoken.

Judges J. B. Bridges of Olympia, Washington, and H. D. Harlan of Lansing, Michigan, spoke of the friendly relations likely to result from this trip. Judge H. M. Garwood of Houston, Texas, expressed himself as ordinarily opposed to any motion at sea,

but yet moved that we consider ourselves in equity with that done which ought to be done, and therefore all introduced to one another withour further formality. Judge Garwood, coming from Texas, where the community property law prevails to take from a husband an undivided one-half of all his property for the benefit of his wife, expressed his admiration for the Common Law, which allows to the husband all the personal property of his wife as soon as reduced to possession. He said he was anxious to visit the home of the Common Law, where a man might chastise one's wife with a stick if no bigger than his thumb. Judge Garwood was about to express a desire to go still further away from Texas; in fact, somewhere "east of Suez," but happened then to notice that his helpmate was not, as he had supposed, absent from the room. He accordingy reversed his engines, moved himself for and immediately granted a re-hearing, and announced as his opinion that the Common Law was brutal, archaic and no good anyway.

Former Ohio Attorney General F. S. Monnett of Columbus, Ohio, made a few observations (unaided by the sextant and happily lacking in longitude) and called on Mrs. Jessie Adler of Cincinnati, Ohio, an assistant prosecutor, who graduated from law school simultaneously with her son, ranked him in the class and spanked him in the home. Mrs. Adler queried, "What were the women doing when the men established that Common Law rule of thumb?" Answer: Pointing the finger of scorn, of course. She opined women could be lawyers and mothers and wives as well (a large program, we call it). Mrs. Oda Falconer of Los Angeles, Cal., told the well known story of her townsman who remarked at the funeral, "Well, if no one wants to speak of the deceased, I shall say a few good words about Los Angeles."

As the speaking continued, three destroyers (ships, not speakers) appeared forward the bowsprit and the meeting faded into low visibility.

Sunday, July 13.—The sun arose in glory, tinting the clouds in most delicate Ridgeway Knight hues of pink and grey; the day fine, sea calm. Divine services were conducted in the main salon, led by the Captain, aided by the Purser and by the ship orchestra. A collection for the Seamen's Aid Society was taken with good results by the smoke room steward—a most judicious selection for the exercise of gentle duress. The omnipresent Gulf Stream befriended us and wrapped us about. We saw much seaweed, a sea tortoise, Portuguese men o' war, flying fish, a bird, dolphins (more poetic than porpoises and avoids possibility of the usual trans-Atlantic "What is the purpose of the porpoise?"), a (Sunday) school of sharks (not aboard).

We overhauled a ship after much preliminary misinformation regarding her line and destination. We had a gala dinner, attended necessarily by much learning of French, one gentleman ordering three dishes from the menu and found all were potatoes.

Monday, July 14.—A fine day with a clean breeze raising a few whitecaps, very welcome after the night caps preceding. The Blackstone Committee made a way of necessity for the stragglers and took tithes. About noon, a whale was descried coughing in the offing, and later more were seen so close to the ship their bodies could be discerned, as in the old advertisements of Sapolio. Their spouting was not comparable to that when, at four bells afternoon watch, the barristerines on board (about half a dozen) met.

At eight bells afternoon watch (proper acknowledgment to Bonding Company booklet, "My Trip Abroad," on how to say the time in high seas language) a children's party was had in the port palm garden. Twenty-five or thirty little ones were assembled from all classes of the ship—ages 3 to about 13. Included in the number was little John of Blackacre, a darky boy who swallowed tea and stuffed himself with cake in much the same way as the little Johns and Jeans of Whiteacre. Confetti, balloons and vari-colored caps added to the lovely picture. Musical chairs (Purser Cartwright at the piano) and dancing followed.

By this time special entertainments succeeded one another so fast it was necessary to have a special printed docket of events for the trip, which each passenger received at dinner. A progressive bridge party was followed by dancing, Purser Cartwright again leading convoy.

Tuesday, July 15.—Aroused by raucous cacophony of the foghorn; very reminiscent of client who has just lost a case. Nineteen Rotarians met at lunch with Captain Britten as guest of honor. Included in their number were Henry G. Molina and O. B. Tracer from San Juan, Porto Rico, and Carl S. Carlsmith of Hilo. Gathering of University of Virginia Alumni, Harvard Law School members, registered on port side; heaving listing of the ship to port.

Two bells after second dog watch assize court assembled. Lord High Sheriff of Nuttyham, F. J. Higgins, Jersey City, N. J., "bearded like a bard," despatched business and almost despatched some of the hangers on in Court with his resounding gavel. The beard was the beard of France, but the voice was the voice of Irish. Now waddled in the judges, gorgeous and majestic in (bath) robes, furs and (dressing) gowns. As each judge entered, the bailiff put the populace through a course of getting up exercises; elevation to the bench was more than ordinarily difficult, as the judges' chairs were poised perilously on a large sofa. Fortunately, the sea remained propitious, else the maxim, "Facilis descensus averni," would have been involved.

Present were: Lord Chief Justice Allrich (F. H. Aldrich, Detroit); Lords Beach (George R., Jersey City); Sands (A. H., Richmond, Va.); Fish (F. L., Vergennes, Vt.); Hughes (F. T., Sharon, Pa.); Haight (T. S., Jersey City); Snow (L. P., Rochester, N. H.). Two Barristers—Isaac Sutton, Philadelphia, Pa., and Barry Mohun, Washington, D. C.—appropriately gowned and wigged, sat at the Counsel Table and, following the call of the calendar, moved for the admission of Miss Victrola Sonora to the Bar. Two Barristeretts—Mrs. Adler, Cincinnati, and Miss Lucy R. Somerville, Cleveland, Miss.—likewise took milk. A femme sole, in fact unique (the assistant purser), took the part of Victrola. Victrola's record was bad. Cur ad vult, or freely, the Court gave her the air. Two judges descended.

A race card for the first meeting of the A. B. A. Turf Club on the New Race Track "B" Deck, port side, was distributed, and thrilling horse races held in honor of Baron Brampton's (Henry Hawkins') memory.

The foghorn continued to blow and drowned

out the more pleasing sound of the clinking of ice in the glasses.

Wednesday, July 16.—Sunshiny, fine weather with a gentle swell, but all were Masters of the Rolls by now.

2:30 p. m.—Olympic Games, "B Deck," Port Side. Events: Potato Race, Chalking Pig's Eye, Shaving Race (Women Barbers), Pillow Fighting on Lashed Spar, "Are You There?" Tug-of-War (both men and women teams).

9:00 p. m.—Concert in aid of British and American Seamen's Institutions. Chairman, Reginald H. Smith. Collection.

Thursday, July 17.—Sea smooth, a slight drizzle, leaden skies, no sun, no wind, no end of meetings.

8:30 p. m.—The District School was begun by ringing of the School bell.

Teacher: Judge Frank L. Fish, Vergennes, Vt., who once had held that position long before being demoted to the bench.

School Trustees: Judge Fred F. Fayville, Des Moines, Iowa, "Col. Brown"; Judge Leslie P. Snow, Rochester, "Squire Jones"; Judge Fred H. Aldrich, Detroit, Mich., "Deacon Smith."

All were appropriately dressed for the parts and acted them admirably. The Trustees wore silk hats just out of dry dock.

The Scholars, dressed like boys and girls, chewed gum, shot paper wads, and forgot their parts and broke down most artistically.

School opened with the singing of "Old Grimes." It was Friday afternoon, the last day of the term. After the rhetoricals, the Trustees quizzed the school. Following this, sides were chosen and the school spelled down, Mr. Hopkins of Chicago being the last to go down. One speller spelled "Guinea" "I-t-a-li-en" and others who depend for spelling on their stenographers quickly failed.

Friday, July 18—The sea smooth, sky gloomy. Numerous other meetings. Thirty-two Ohio citizens met at lunch. Various college and fraternity groups assembled. Land was sighted with regret about 4 p. m. College cheers for Ireland—inky skies with the sun occasionally breaking through. Trawlers and gulls. A political convention was held in the evening, with numerous speeches and much applause for Pres. Coolidge and Davis. Mr. Monnett presiding. The vote, taken by little girl pages, was 125 Coolidge, 98 Davis, 3 La Follette (undisclosed adherents). For Vice-Pres., Purser Cartwright 3, Mrs. Adler, -. As we took on the pilot at Queenstown harbor the moonlight broke through the clouds, as one's point occasionally (albeit rarely) breaks into the judge's mind. Naturally, we took greens aboard in Ireland, also sole.

Saturday, July 19.—The following telegrams were exchanged:

"To Their Majesties King George and Queen Mary,
Knowsley Hall, Liverpool.

"The members of the American Bar Association on board the 'Laconia,' having crossed the Atlantic Ocean under the safe conduct of gallant English seamen, beg to send to Your Majesties their greetings and to express their great pleasure that they shall soon reach the hospitable shores of your Kingdom, for which they entertain so strong a feeling of close friendship."

"To the Captain S. S. 'Laconia,' Liverpool.

"The King and Queen warmly thank the members of the American Bar Association on board the 'Laconia' for their kind message of greeting. Their Majesties hope that their visit to England will be a very happy one.

"(Signed) Private Secretary."

At Liverpool all the ships were dressed and in their best slips. We thought it was in our honor, but found the King and Queen had that day dedicated a new cathedral there.

There was a wide geographical distribution of passengers in our list—some from Australia and from 38 States and the District of Columbia, Porto Rico, Hawaii and England. We docked and ducked.

Abstract of the Official Log follows:

CUNARD R. M. S. "LACONIA"
Captain E. T. Britten, R. D., R. N. R.
NEW YORK to LIVERPOOL (via QUEENSTOWN)

Date, 1924	Runs	Lat. N.	Long. W.	Weather, Etc.
July 11				At 5:05 p. m. G. M. T. left Company's Wharf. At 7:10 p. m. G. M. T. Ambrose Channel, L. V. abeam.
July 12	341	40.14	66.25	Light following wind, smooth sea, clear weather.
July 13	435	40.14	56.55	Moderate breeze, slight swell, clear.
July 14	425	40.29	47.37	Light breeze, slight swell, clear.
July 15	404	43.44	39.50	Mod. breeze and sea. 1h. 31m. reduced speed, fog.
July 16	384	46.43	31.50	Mod. breeze and sea. 5h. 46m. reduced speed, fog.
July 17	388	49.21	23.03	Mod. breeze, rough following sea, cloudy and clear.
July 18	399	51.02	13.02	Light breeze, slight swell, overcast.
July 19	185	To Daunt's Rock L. V.		At 11:45 p. m. G. M. T. Daunt's Rock, L. V. abeam.
	2961			

Passed Daunt's Rock Friday, July 18, at 11:45 p. m. G. M. T. Average speed, 17.15 knots.
Length of passage—Ambrose Channel to Daunt's Rock—7 days, 4 hours, 35 minutes.

M. S.

The Lost Log of the Aquitania

We had hoped to present an equally veracious log of the Aquitania in this issue. The official log-keeper was duly appointed at Philadelphia. He was made familiar with the exacting and supremely important duties of the undertaking. He showed willingness, enthusiasm; and the members of his party included his wife, sister-in-law (a lawyer herself) and son, thus supplying him with a capable staff not likely to overlook any important details. He went to New York in plenty of time to catch the boat. Unfortunately, he and his party did not go to the dock in time to catch it. When they arrived, the Aquitania had already sailed.

An employe of the steamship company, it appears, had informed him and his party that the boat sailed by New York Standard Time, instead of by New York Daylight Saving Time. Hence the misunderstanding, which the company promptly met by booking the party to sail on the Laconia, due to sail a day or so later. The fact that all the party's baggage had gone on the Aquitania, bound for Southampton, whereas the Laconia was destined for Liverpool, naturally caused the worthy log-keeper some annoyance, but the obliging shop-keepers of Manhattan cooperated cheerfully to supply a temporary sea-going outfit for all. Thus it was that the Laconia, which had already been provided with the alert and enterprising log-keeper whose careful record appears in this issue, had an extra one aboard, while the Aquitania had none at all.

THE SOURCES OF OUR AMERICAN INSTITUTIONS

Charge that Mr. F. Dumont Smith's "The Story of the Constitution" Draws System too Much from German and English Sources and Overlooks Early American Experience as Well as Contributions of Other Peoples, Notably the Romans — Mr. Smith's Reply to Mr. Norton's Criticism Maintains Validity of His Thesis of American Constitutional Origins—The Latter's Answer*

Chicago, April 15, 1924.

Mr. F. Dumont Smith,
Attorney at Law,
First National Bank Building,
Hutchinson, Kansas.

Dear Sir: I thank you for sending me the copy of your "Story of the Constitution," prepared for the American Bar Association for the use of the young people in school. It is beautifully written, in a flowing and clear style; but in two or three essentials it does not seem to me to be sound history. In the next printing the text might be somewhat modified.

My exceptions are directed (1) to your drawing our constitutional system too much from German and English origin; (2) to your overlooking the real sourceground of our government, the century and three-quarters of American experimentation in all sorts of circumstances and conditions before the Constitution was written, a period which, because of the influence of our Constitution on the governments of the world, I believe to have been the most important epoch in the civil history of mankind; and (3) to your failure to recognize the contributions of other peoples, notably of the Romans, the formulators of principles which not only modified very markedly for the better English law, but which also govern half the civilized peoples of the world today, men fitly described by Lord Byron as "those dead but sceptered sovereigns who still rule our spirits from their urns."

No one appreciates more than I do, as is evidenced by my book, "The Constitution of the United States: Its Sources and Its Application," our debt to the English for law in behalf of the man and his property. The world has seen no braver picture than that of the Englishman fighting for centuries to get his government off his back. But I believe that the constitutional government of the United States is American, and that this should be taught with emphasis to young America. It seems to me as unnecessary to labor to trace back our government to European sources as it would be to find European origin for the American steel building, that expression of light, cleanliness and comfort which has become the admiration and the pattern of all countries. While many kinds of building had existed in Europe, and while it cannot be said that the modern office building in this country is not like in some respects (as in the matter of windows and doors) European buildings, still no well-informed architect would endeavor to write a book showing that our steel building originated in Europe. In government, as in buildings, we are of course the heirs of time, but America stated and applied principles for the control of power which were new to men and which have changed most of the systems of the world.

It is the control of power with which constitutions have to do. The so-called guaranties of life, liberty, and property have always been mere phrases where the powers of government have not been controlled. In America control was first achieved.

Napoleon described history as "a fable agreed upon;" and Voltaire warned against our believing "ancient history in particular," because he said that it is the work of fabulists. The historians "make" too much history. Many works once standard have been entirely discredited by research. It was fabulists who worked out the theory that the Saxon took a polity to England and that the English brought or sent it to America. We have no real definite information about those times. Yet, since the German house of Hanover went upon the English throne a great deal has been written with positiveness by sycophants to show that constitutional government in Great Britain and in the United States is owing to the Germans—a people who never had such a government themselves before 1871, and who spent the centuries down to 1914 in submission to a succession of tyrants and autocracies. Thus the first two chapters of Stubb's "Constitutional History of England", dealing with early polity, cites thirteen German writers. Waitz' "Deutsche Verfassungs-Geschichte" is cited on every page and on some pages many times. It may be all right for an Englishman to get the history of his own country from German authors, but I doubt it. At any rate, I cannot consent that the origin of our Constitution be discovered through him.

As said, the history of early Germany and of Saxon England is very indefinite. I have studied Tacitus carefully, and I never could find anything in "Germania" to justify even remotely what German and English historians have based upon it. Tacitus says no more about government among German tribes than could be said of any of our highest Indian tribes. All tribes have government. Self-defense is an instinct. But on such a commonplace fact as tribal order we cannot predicate the proposition that the British government proceeded from it and ours from that. When the Germans began gathering in cities they found Roman law ready, Walton says, and adopted it and have since used it. Germany has always been one of the most Roman of Continental countries. Its constitution of 1871 borrowed much from ours.

What has been built up on a few statements in the "Germania" of Tacitus and on Caesar's "Commentaries" reminds me of the construction by "scientists" of the Neanderthal man out of a small piece of the top of a skull. They deal with him as cocksurely as though they had lived with him.

In "The Puritan in Holland, England and America" Douglas Campbell not only rejects the theory of

*Mr. Smith's "Story of the Constitution," written to forward the work of the Association's Committee on American Citizenship of which he is a member, tells in fascinating style the story of our American institutions. It is intended for popular reading and has been widely distributed by the committee.

the British origin of our system, but he also takes the position that our Constitution and our federative plan both came from Holland, where Puritanism as a political force began. His theory is fully as good as the other. He wrote a two-volume work of a thousand pages on this subject and his manuscript was read in whole or in part by the Rev. Dr. Charles A. Briggs of the Union Theological Seminary, Prof. C. C. Langdell of the Harvard Law School, and Prof. A. M. Wheeler of Yale. He says that New York and New Jersey were settled by the Dutch West India Company, that William Penn was half Dutchman, that Roger Williams of Rhode Island was a Dutch scholar, that Thomas Hooker, who gave life to Connecticut, was from Holland, and that the so-called New England institutions were found in New York when it was a Dutch colony—notwithstanding all of which, and more, he adds, "we are continually told that we are an English people, with English institutions." That, he says, is because our historians have been "almost exclusively Englishmen, or descendants of Englishmen." He, too, believes that history is sometimes made by historians.

With the doctors of history who are seeking to find the origin of the American government in foreign countries thus in hopeless disagreement, what becomes of the sound education of the American youth? No wonder he hasn't any. The thing to do is to reject all those theories as historically untenable (since they are) and to teach that our government is the product of American experience and intelligence applied for over a century and a half under the pressure of American circumstances—which it is.

At page 21 you say:

> With the revolution of 1688 the British constitution very speedily took on its present form; and, as it is more or less the model from which our Constitution was formed, it is necessary to know just what that constitution was.

"More or less the model" is too vague for historic value. As Lord Bryce pointed out, the British really have no constitution. All that they possess could be set aside by Parliament, he wrote, "as quickly as it could repeal the last Explosives Act." Our legislative body cannot do anything like that, which is a good illustration of the fact that fundamentally—very fundamentally—our fathers did not follow "more or less" a British model.

A comparison of the British government in 1787 with our Constitution is enough to show that it served our forefathers, not as a model, but as an example of what a government in a new and clean world ought not to be. Thus they created an Executive Department without the absolute veto power, without the power at whim to convoke and dismiss Congress, without the power to declare war or make treaties, and without many other powers which the executive in England had possessed.

They created a Congress consisting of a Senate made up of men representing states as political organizations, which body could, of course, bear no resemblance to anything that existed in Europe; and a House of Representatives composed of members elected directly by the people, as the members of the House of Commons in England never had been. The present-day apology of the English people for the acts which brought on our Revolution is that Parliament did not represent the people. That is true. The House of Commons did not become a popular body according to our understanding of that term until after our Civil War, when manhood suffrage was extended quite widely, though not to all. Our fathers placed twenty-nine direct and many indirect restrictions upon the Senate and the House of Representatives, whereas the House of Commons was then and is yet absolute in power.

The framers of our Constitution provided a third department, the Judicial, the like of which did not exist in England then and does not now. It was intended to pass upon constitutional questions and to restrain the other departments and keep them within their designated spheres. It was particularly designed to prevent in the United States the erection of a legislative despotism like that which they saw and had felt in Great Britain. "A legislative despotism," said Jefferson, "was not the government we fought for."

In Fisher's "Evolution of the Constitution" he shows twenty-three documents in illustration of the development of the federalism in America. Along with the development of federalism was the growth of administrative parts.

The problem of our Constitutional Convention was, not to form a federal *government*, but to *create* a federal *state*, a new entity acting as directly upon the people of each of the state entities as the states themselves act, a co-ordination of two separate systems, each of the members of which must be "wholly independent in those matters which concern each member only," and all of the members of which "must be subject to a common power in those matters which concern the whole body of members collectively."

That cannot be traced back to the time of Julius Caesar, or of Tacitus, or of the Saxon Chronicles. That is American. Let us make all this plain to the boys and girls. The great trouble in the United States today is that education is very deficient in showing whence our government came, what it cost, and, therefore, what it is worth. And the most fruitful century and a half in the whole life of the world is practically an unknown age in the history studied by American youth. Instead of bringing into the schoolroom and glorifying the works of that time, all of which are of authentic record, we have hitherto searched for an alien beginning through the fogs of legend.

At page 5 you write:

> When suffrage was granted to women in this country by the Nineteenth Constitutional Amendment we merely restored woman to the same position she held among our ancestors in the German forests two thousand years ago.

Of course it is not historic to indicate that the American women, who had been voting in some of the states for nearly half a century, had been backward in comparison with the woman of Germany, who never had and has not now any political power. As neither man nor woman in Germany had suffrage as we understand it down to the German constitution of 1871, the best features of which were American, and as the German woman did not get it then, it requires an extraordinary exertion of the imagination to connect across so many centuries the constitutional position of the American woman today with that of the tribal woman in the German forests. Even were we to concede that the seeds of popular constitutional government existed in the Germany of Tacitus or in the Britain of the Saxons, how could that affect America when those seeds never had come to fruition in either of those countries up to 1787? And how can the early House of Commons be traced to the Folkmote of the Saxon when a House by popular election never existed in England prior to the time of our Civil War?

You have collected a great deal of interesting and valuable matter and presented it in a very spirited

and engaging way, but I believe that in the particulars mentioned you have followed too closely writers using German sources to the disregard of our country's history, and of the influence of other peoples.

Yours very truly,

(Signed) T. J. NORTON.

Hutchinson, Kan., May 13, 1924.

Mr. Thomas J. Norton,
Railway Exchange Building,
Chicago, Ill.

Dear Sir: In your first letter to me criticizing my pamphlet "The Story of the Constitution," I recall that you complimented the style but told me that it was poetry and not history. I wrote you that your indictment was too general, that I could not plead to it unless it was made more definite. I have now to thank you for your letter of April 15, for the many kind expressions in it and for the definite nature of its criticism which amounts to this:

That I draw too much from and give too much credit to early Germanic sources of our free institutions and American Constitution, ignoring other sources, principally Dutch impressed upon the Puritan residents in Holland, and Roman Law. This is an old controversy. Senator Beveridge some time ago raised the particular question as to the Dutch sources, quoting as you do from Douglas Campbell's book.

Let me at the outset make my position clear. I hold that there are four fundamentals of free government and only four. Four essentials upon which all the others depend, from which they draw life and support. These four are: first, the right of the people to choose their own rulers; second, the right to make their own laws by representatives freely chosen; third, the right to tax themselves; fourth, trial by jury. These are the four cornerstones of our Constitution and of the English Constitution. The superstructure may vary, it may have many doors and windows for light and access, it may have many different rooms for convenience of the government, but upon these four cornerstones rests the whole temple of free government. If the people have the right to choose their own rulers, if they have the right to make their own laws by representatives freely chosen, if they have the right to tax themselves, if they may have their civil and criminal causes tried before a jury of their peers chosen from the body of their fellow citizens, they have a free government. Without any of these essentials they have not. (Of course, to some extent, with the modern independence of the Judiciary of both the Executive and the Legislative branches, trial by jury is not the sacred thing that it was with our fathers, and yet it is so hallowed by precedent, it has fulfilled so important an office in the safe-guarding of our liberties, that it has become a fetish of the Anglo-Saxon people).

Given these four essentials there can be no tyranny, no usurpation of power. All of the other rights so meticulously set forth in the Ten Amendments, flow from these fundamentals, religious liberty, freedom of speech, freedom from unlawful search and seizure, the right to bear arms, the right to petition, the right to peaceably assemble, and all of the other great rights which have been established and safe-guarded by these four fundamentals. Every one of these rights are Anglo-Saxon. (I use this term because it is the common expression, hardly descriptive but by common acceptance everyone knows what it means). Not one of these can be traced to Dutch, Roman or any other origin. I quite agree with you that until the close of the eighteenth century there was very little real history written. History was largely fable because it was written to please the government in power, a dynasty or a ruling class. The history of Charles XII. by Voltaire is perhaps the first example of modern history, speedily followed by Gibbon, and Hume. But the historians that I shall cite, English historians of the Victorian era such as Stubbs, Greene, Freeman, Lecky, Hallam, and May, can hardly be said to be toadies of the Hanoverian sovereign.

To begin with I will cite one historian, John Fiske, whom you will hesitate to impugn, born in Connecticut, utterly free from foreign influence of any kind, indefatigable in research, clear, lucid, analytical, and above all philosophical. He may well be crowned one of the first of American historians not below Motley, Prescott or Parkman. In his work on "The Beginnings of New England" in the opening chapter he describes the three forms of government which have successfully governed large territories. The Asiatic, a despotism which, conquering subject peoples, reduced them to slavery, governed by Satraps, without a human right. The Roman, conquering wide territories and alien peoples, submitting all of them to the rule of the Roman Law, granting them eventually the status of Roman citizens, so that to say "Romanus sum" became the proudest boast even of St. Paul, but governed despotically, ruling them tyrannically from Rome, taxing them at will with no right except the right to be judged among themselves by Roman Law. And last of all the representative government invented by the Anglo-Saxon, never heard or dreamed of until our English forefathers in Saxon times devised and established it. Thus and thus only have the modern English world, the great British Empire with "its far flung battle line" on which the sun never sets, and the American Federal Union developed. He points out that the conflict between little England and mighty Spain in which England won, and a hundred years later between England and the empire of Louis XIV., was a contest between these two systems, Spain and France typified the Roman system as against the English free representative government, not as free then, of course, as it is now but emerging swiftly from Feudal despotism.

If you reply to this, I shall be glad to have you tell me where you can find in the Dutch Republic or anywhere in the Roman Empire or where from any continental source we derive any of these four essential principles of free government and their sequillæ. You will be bound to admit that everyone of them is an Anglo-Saxon invention. They existed in Saxon England because there was the representative assembly, the Shiremote, the Saxons at will chose their own rulers, and Harold, the last of the Saxon kings, was elected and the heirs of Edward the Confessor were set aside. When Norman Baron and Saxon Franklin confronted King John at Runnymede the demand of the people who had by amalgamation become English, was not for a new thing but for a return to "the laws of Edward the Confessor," the last but one of the Saxon kings.

Let us turn first to Dutch sources. You quote Douglas Campbell, whose book I have never read, but you say on his authority "that our Constitution came from Holland where Puritanism as a political force began." Puritanism as a political force, the rejection of the divine right of kings, the right of a king to impose a form of worship upon his people, the demand for religious liberty, began with Wycliff and the Lol-

lards two centuries before Puritanism was heard of. It slumbered for a while but revived under Elizabeth and grew to a living flame under James.

The Puritans went to Holland in 1606, a few of them. After fourteen years residence there they began to fear that the Dutch toleration of all religions, intimate contact with the many strange forms of worship, would contaminate their members and in 1620 a small body of them emigrated to New England and landed at Plymouth. More than one-half of those who came over on the Mayflower died the first winter. At the end of nine years when the Plymouth Charter was granted, there were less than three hundred of them. In that same year the real settlement of New England began under the leadership of John Winthrop, founding the Massachusetts Bay Colony which became Massachusetts and into which later the little Colony of Plymouth was merged. In the next ten years more than fifteen thousand of these Puritans emigrated to Massachusetts, not one of whom ever saw the shores of Holland. It was the greatest exodus that the world has ever seen since the Israelites left Egypt. No such selected body in character, education and substance ever went from one country to another. They founded Puritan New England. They were "Separatists," "Independents." They rejected not only the church of England but the Presbyterian church. They rejected all church government except the government of each congregation and lived by the Word of God alone.

It must be admitted that they did not found at the outset a democracy. Their ideal was a theocratic government modeled after the Israelites under Moses, Johsua and Samuel. What they did establish was a very narrow, rigid hierarchy, governed absolutely by the ministers of the Independent Church, what I suppose we would now call Congregationalists. Neither Catholic nor Protestant, unless he belonged to that church, could vote. They persecuted the Quakers, branded them, whipped them at the cart's-tail and hung four of them, including one woman, Mrs. Fisher. Did they get that from tolerant Holland? And yet that sturdy independent spirit built up the most powerful commonwealth on the American continent, the chief obstacle and stumbling block to kingly power, the colony that initiated the Revolution. If you will read carefully Fiske's story you will find that he derives every one of their institutions, their assembly, their courts, their laws from English tradition.

You speak of Hooker. Hooker was a minister of the Independent church. He was silenced by Archbishop Laud for denying the right of the king in matters of conscience. He taught a grammar school for two years and then went to Holland where he preached at Delft for three years and then went to New England. Very shortly he fell out with John Cotton and the other Puritans because of their narrowness and their persecution of other sects. With his flock, shortly followed by other liberal churchmen, he went to Hartford and founded the Connecticut Colony. It was there in his first sermon that he announced the doctrine that the people were the sole repositories of political power, that neither an anointed king, a consecrated bishop, nor an ordained minister had any more political right than the plain common citizen. It was the first time that this doctrine was openly pronounced on American soil. The people of Connecticut formed they restricted the franchise to members of the Independent church. They never had a charter from the English crown and everyone is familiar with the romantic story of that charter which Andros attempted to seize, the candles were blown out, and it was smuggled away and hidden in the famous Charter Oak, and that constitution lasted until 1818. Hooker had spent forty years in England. He spent three years in Holland. When Mr. Campbell or anyone else tells me that he got his idea of political freedom from his three years in Holland and not in his forty years in England, that he got those ideas from Holland, those ideas for the preaching of which he had been silenced by Laud in England, he insults my intelligence and falsifies history.

You speak of Roger Williams as a Dutch scholar. Roger Williams was the son of a London tailor, who fell under the admiring observation of Sir Edward Coke, who procured him an education. He never saw Holland. He emigrated direct from England to New England. He fell immediately into a controversy with the New England hierarchy, fled from a sentence of banishment, took refuge with the Indian Chief Massasoit and founded the Narragansett Bay Colony which later became Rhode Island, where for the first time on American soil absolute religious freedom was established. Since he never was in Holland, he could hardly have brought that idea from there. In 1663 he procured a charter from Charles II. which among its fundamentals provided for religious freedom. Charles II. at that time, because he wanted toleration for the Catholics, was granting toleration to all other sects. That was one of the complaints against him.

You say, apparently quoting Campbell, "that the so-called New England institutions were found in New York when it was a Dutch colony." I call your attention to Thorpe's American Charters and Constitutions which you should study. It contains the charter and constitution authentically reprinted, of every American colony and state. Under the head of New York you will find that New Amsterdam was despotically governed by governors appointed by the Dutch West Indies Company, such men as Van Twiller, Kieft and Stuyvesant. There was no representative assembly but these Governors occasionally appointed burghers as members of his Council and as frequently removed them. In 1649 the settlers of New Amsterdam held a convention and petitioned the Holland government to grant them a "suitable burgher government." The directors of the West India Company said to them, "We have already connived for the many impertinences of some restless spirits in the hope that they might be shamed by our discreetness and benevolence but perceiving that all the kindnesses do not avail, we accordingly hereby charge and command your Honor (meaning the Governor) that whenever you shall certainly discover any clandestine meetings, conventical or machinations against our government or that of our country, that you proceed against such malignants in proportion to their crimes." That is the kind of a government that the Dutch had in New Amsterdam when the English were founding Connecticut and Rhode Island. New York never had a representative assembly until it came under the English crown.

You say that the Dutch settled New Jersey. My histories say that New Jersey was settled by the Swedes and that afterward the Dutch overflowed into it. Probably my histories are wrong. At any rate New Jersey their own constitution with religious freedom although never had a constitution or a charter until 1664 after it had been taken from the Dutch.

You speak of William Penn as half Dutch. His mother was a Dutch woman. Penn's father, the Admiral, had been the close personal friend of Charles

II. and he granted Pennsylvania to William Penn with autocratic power and in 1681 Penn, who had never been in Holland and was a Quaker, gave his colony a government with an assembly, an English assembly, and gave the franchise "to all free men and planters," the first example of universal suffrage in America, which was later withdrawn and the property qualification instituted after the colony had bought out Penn's rights. But Penn as Lord Proprietor, retained the Governorship and right of veto, governed usually by his deputies and his heirs continued to be Governors until Pennsylvania bought out his heirs for the sum of $500,000.

Turning back to the Dutch Constitution. At the time the Puritans lived there it was as far from being a Democracy as Venice, in fact it was a pure oligarchy, controlled by hereditary nobles like the Prince of Orange, great land owners and wealthy merchants, ship-owners and heads of the various guilds. Each city, like Amsterdam, was a pure aristocracy. And note this, at the present day the suffrage in Holland is confined to those who pay certain communal duties and office holding is confined strictly to certain classes. No laboring man can be either a voter or an office-holder in Holland as he is in England. Holland was a republic but it never was a democracy. The myth of Dutch influence on our institutions is absolutely unsupported by any historical fact.

I might easily sidestep your allusion to Roman Law because I was not writing a history of the municipal law of England and America but of the Constitution. However, since you present the issue, let us consider it.

You assert the powerful influence of Roman law upon our Constitution. I think you will hardly say that John Norton Pomeroy, author of "Equity Jurisprudence" is either a "fabulist" or a "toady" of the Hanoverian kings. In the first volume of his Fourth Edition, if you will examine it, he gives the beginnings of equity jurisprudence in England. After a history of the Roman law and its administration on page thirteen, he notes that the Saxon law was largely customary. "The Saxon local folk court and even the supreme tribunal, the Witenagamote, not being composed of professional judges, were certainly guided in their decisions of particular controversies by customs which were established and certainly were considered as having the same obligatory character which we give to positive law." Then he goes on to say that in the reign of William the Conqueror, the local folk courts of the Saxon polity together with the manor courts of the Normans were the courts of first resort. Very gradually the common law courts grew up under which the "lex non scriptae" became the "lex scriptae" as the courts began to give their decisions in writing. He bemoans the immediate commencement of that rigid adherence to precedent which finally compelled the establishment of the equity jurisdiction of the Chancellor with principles borrowed from the Roman law to relieve the rigidity and injustice of the common law. He points out that it was not until Holt's time and very late in that time, and, in fact, not to any considerable extent until the time of Mansfie'd, that the English judges began to borrow from the Roman law, about the beginning of the eighteenth century. I have never shared the blind reverence for the English common law. The professors of civil law on the continent viewed the English common law, with its rigidity and adherence to precedent, with contempt. Unquestionably the great body of the Roman law, with its continuous free growth and what we now call Civil Law succeeding, is the greatest contribution to the jurisprudence of the world that the law knows. It is for that very reason that today it rules more than half of the civilized world, but when English judges began to borrow from it, when the King's Chancellor began to issue writs in equity, the Roman law was a graft upon our system, not a root, mark that. The Anglo-Saxons never borrowed from the Roman law a single fundamental constitutional principle. I defy you to show me in any part of the fundamentals of our Constitution or the English constitution, one single feature that we derive from the Roman or civil law. Enough of that.

You allude to the adoption by Germany of the civil law as an argument that the Anglo-Saxon does not owe his institutions to his Germanic ancestors. You speak of the Germans, in their conquests of cities, finding the Roman law which they adopted. That is quite true on the continent but in the conquest of Britain, unless Greene, Freeman, and every other hi torian of England is wrong, when our Germanic ancestors conquered England they destroyed every trace of Roman civilization. They destroyed alike, Roman temples, christian churches, Roman law and druidic worship, as they destroyed or drove out all of the the inhabitants of England. Unless all historians are wrong these Germanic tribes planted themselves and their religion and institutions upon that which they had made a vacant soil. The Roman law never knew of a trial by jury. The Saxons established it in a crude form. The Roman law never knew of a ruler elected by the suffrages of all the people, yet such in effect were the Saxon kings. The Roman law never knew such a thing as a representative law making body (I speak now of that Rome which conquered the world), the Saxon Folkmote. As the country increased in population, this changed into the representative assembly of the Shiremote which became the model of the House of Commons, so say Freeman, Greene, Stubbs and May. They say also that the Witenagamote became the King's Council and later the House of Peers. I leave you to quarrel with them. Perhaps they, too, are "fabulists" and "toadies." The Roman law ultimately and beginning with the eighteenth century powerfully influenced the English law, but it never in any degree influenced the English or American constitutions.

You say that England has no constitution because Parliament is omnipotent and may at any time change the English constitution by a bill duly enacted. I do not understand that a constitution depends upon the machinery by which it may be changed. My dictionaries, and I have several, thus define a constitution: "the fundamental organic low or government of a nation, state, or other organized body of men embodied in written documents (as in the United States) or implied in the institutions and customs of the country (as in England)." "The British constitution belongs to what is called customary or unwritten constitutions." "The Constitution of the United States belongs to what are often called rigid constitutions which cannot be changed except through such processes as the constitution itself ordains." Lord Bryce never said, as you suggest, that there was no British constitution. He simply said what everyone knows, that Parliament can at any time change the constitution. What is Parliament? It is the representative body of the British people freely chosen. If Parliament tomorrow should abolish the crown, as it could, it would be done by the representatives of the people and if the people were not satisfied with this act of their represente-

tives they would at the next election choose a body that would re-establish the crown. How do we change our Constitution? Two-thirds of a quorum of the House and the Senate propose a constitutional amendment. They are not chosen specially for that purpose, it is simply a part of their functions. If three-fourths of the Legislatures of the different states by a majority of a quorum in each House adopt the amendment, it then becomes a part of our fundamental law and these Legislatures are not chosen especially for that purpose. The people do not in any case vote upon this change in the Constitution. They change their constitution, first through their representatives in Congress, and, second, through their representatives in the state Legislatures. The British change their constitution by a single act through their representatives in Parliament. The difference is not in principle but in machinery. Ours is slower, more difficult, but in each case, it is accomplished not by the people themselves voting directly but by their representatives and it is worth noting here that in spite of the circumlocution by which we must accomplish a change, we have amended our Constitution nine times since 1792 and in that time the British have amended their constitution once, restricting the veto power of the Peers to one adverse vote on a bill passed by the Commons. If it is passed the second time it becomes a law.

You mention certain novelties in our Constitution to show that it is purely an American product, for instance, that the House of Representatives is chosen according to numbers while in the Senate each state, however small, has two members. Surely you know that that was not an act of conscious prevision, it was purely a compromise. Four times the convention had voted for a Senate representing population exactly like the lower house. The fifth time, early in July, 1787, when it came up again, the vote was a tie. Delaware openly declared it would leave the convention and hinted that it would form a foreign alliance. It was apparent that the smaller states would secede. A committee of eleven was appointed with Franklin as chairman, which on July 5, 1787, recommended what was called the Connecticut plan, although it had been very early suggested by James Wilson of Pennsylvania. A lower house chosen on the basis of population and a senate with two members from each state and that provision was made irrevocable. This was the turning point in the Constitution and saved the day, but mark this, this as well as the compromise on slavery by which Georgia and South Carolina secured the relegation of slavery to the separate states and in return combined with New England for the adoption of the commerce clause, was simply one of the many compromises in the machinery by which the new government was established. You apparently confuse fundamental rights with governmental machinery. We established a new machinery of government out of the necessities of our situation. For what? For the protection of those fundamental rights that were the birthright of these English colonists, derived from the mother country. Two things in our government were novel and are above praise. A federal system that respecting the independence of its various members in their local affairs, yet operates directly upon the people. The only model for that is the Iroquois Republic, the Six Nations, which endured longer than any federation that the world ever saw and which Jefferson says was the model of our system. Certainly it was not modeled from the Achaian League of the Greek cities, the League of Italian cities against the Emperor Henry, the Swiss Cantons, or the Dutch Republic. The other and most remarkable point in our Constitution is the independent judiciary, clothed with power to restrain the other departments of government within their granted powers. This is the great and distinctive contribution of America to the governmental systems of the world without which this country would have long since dissolved into "dissevered, discordant, and belligerent fragments."

I turn now to an authority which you will agree with me is indisputable. It is a book entitled, "The Constitution of the United States: Its Sources and Its Application" (mark that, its sources), by Thomas J. Norton. Now I appeal "from Philip Drunk to Philip Sober." I appeal from Norton, the critic of my little pamphlet, to Norton the authentic historian. Examining that book carefully I find that in considering the sources of the Constitution you have alluded to British sources forty-eight times. You have alluded to the Roman law twice, once with reference to bankruptcy, certainly not a fundamental constitutional right, and once to the taking of private property. You have alluded to colonial precedents five times and every one of these are about the time of the Revolution. You have not anywhere alluded to the Connecticut, Rhode Island or Pennsylvania constitutions. If, as you say now, we owe our Constitution largely to Dutch and Roman sources, why did you not in this book, which was intended for a textbook for the young, give these sources? You were writing then as a diligent, studious historian. I think I can answer the question. You were unable to find any such sources and I challenge you now, in concluding this too long letter, to cite me to one single precedent in the constitution of the Dutch Republic, or in Roman law from which we could have drawn the four fundamentals of the English and American constitutions and of the Bill of Rights contained in the ten amendments. I do not care to quarrel with you about the truthfulness of Tacitus. His statements are confirmed by all of his contemporaries, Pliny, Livy and Julius Caesar. Probably their government was simply a tribal government, perhaps not much better than the government of the Indian tribes, but they took it with them to England when they conquered it. Out of those seeds of freedom grew the government of the Saxon kingdom with a law crude but suited to the time, laws made by the people and binding both upon the king and the citizen. Rude courts and a crude form of trial by jury on which were based and out of which grew eventually the English constitution.

You continually allude to the modern constitution of Germany as though that had anything to do with our controversy. The Germanic tribe who conquered Rome adopted Roman laws and to some extent the Roman language and the modern Germanic constitution grew out of that. It was the happy isolation of our forefathers on the little isle of England that enabled them to develop their free institutions, uncontaminated by the Roman polity. You might as well cite the French constitution under Louis XV. It would be quite as applicable to our very pleasant little controversy.

In concluding this too long letter, let me say that it has always seemed to me that if the American child could be taught what I conceive to be the truth, that our Constitution was of slow growth, the result of a long, continuous and bitter struggle lasting more than

a thousand years, bought and paid for by our fathers with a heavy price, it would give them a more appreciative sense of its value. I am

Respectfully yours,
F. DUMONT SMITH.

Chicago, May 27, 1924.

Mr. F. Dumont Smith,
Hutchinson Kansas.

Dear Sir: In reply let me first point out that I made no claim that the framers of our Constitution borrowed anything from Holland. Campbell's two-volume work was referred to for the purpose of illustrating how widely apart theorists may wander when they write without basis of ascertained fact. I said that Campbell's theory (that our Constitution is of Dutch origin) is as good as yours (that it is of German-Saxon origin); and I added that "the thing to do is to reject all those theories as historically unreliable" and teach true American history, a very badly neglected subject. I therefore pass by all your comments on what I drew (but did not adopt) from Campbell's volumes.

But as an interesting fact of governmental history it may be remarked that in 1582, over two centuries before our Constitution was written, a constitution was prepared under which William of Orange would have become (but for his death) Count of Holland. Motley says ("Rise of the Dutch Republic," Vol. 3, Ch. 5, p. 589) that in the year before "His Majesty . . . held in his hands the supreme power, *legislative, judicial, executive*" (italics Motley's), and that under the new constitution William "exchanged substance for shadow, for the new state now constituted a free commonwealth—a republic in all but name." Motley further says that instead of exercising all the powers (Madison's definition of absolute tyranny, Federalist, No. 47) William "was content with those especially conferred upon him." He could not declare war, his appointing power was limited, he was in many ways restricted. "As to his judicial authority," says Motley, "it had ceased to exist. The Count of Holland was now the guardian of the laws, but the judges were to administer them." Do not those divisions of and limitations upon power give a Hollander a better basis for arguing our indebtedness to the Dutch than you have for your Anglo-Saxon theory? William's death made a federal republic where it had been planned to have a constitutional monarchy.

I decline to discuss matters not related to my theorem, which is that the American (not the Teuton or the Briton) invented the constitutional mechanism by which the man became the master of his government instead of its victim. At the time our Constitution was written he was generally throughout the world the victim of his government. No matter what ideals were entertained in England or in any other country as to jury trial, due process, habeas corpus, and the like, the man was the victim of his government.

We could not have borrowed from England the religious freedom really protected by the First Amendment when intolerance at home drove Pilgrims, Puritans, Quakers and others to America. The idea was in England, but the freedom was not. We established the freedom by writing and set up a Judicial Department to guard it. Nor could the framers of the Constitution have gone there for trial by jury when by bill of attainder Parliament sent 969 exiles to become a convict colony in Australia at the very time our Constitutional Convention was sitting, many of them people of the highest type and learning, whose descendants were second to no men that set foot in France during the world war. Nor could our Fathers have gone there for what you call "the right of the people to choose their own rulers," since heredity generally determined that in Britain when edge-tools or revolution did not. Nor could they have gone there for your "right to make their own laws by representatives freely chosen," because anything like the right of manhood suffrage did not come to pass in England until after our Civil War. As to a people's "right to tax themselves," the British idea on this was so unacceptable to Americans that they carried on a successful war against it.

The last four sentences contain all I care to say about your "four fundamentals of free government, and only four," which you consider the four cornerstones of the English constitution and of our own.

As I remarked at the beginning, of what value are your "four fundamentals" and other guaranties where a government may disregard them at pleasure? To prevent that disregard as our Fathers had felt it was the design of our Constitution. In this it was without precedent or pattern.

The Constitution of the United States was the instrument by which the longings of Englishmen and the ideals of other peoples were, after centuries of effort, realized in daily life—that the crushing weight of government should be lifted from the back of the man. No way had been devised to keep the government from breaking the man when it found him in the way of its machinations or otherwise undesirable. While there had been centuries of controversy and conflict which had accomplished much to the glory of English thought, it was still a fact when our Constitution was written that the government could crush the man—could deny religious freedom, could deny jury trial, could deny due process of law, could condemn to death or penal servitude by act of the legislature and without accusation, without counsel, without hearing.

All that was changed by an American invention in government. That invention put in three departments the governmenal powers, each department a protection against the other two, the Judicial Department to pass upon the validity of any act of government that the man affected might see fit to challenge. Professor Dicey of Oxford, quoted at pages 180 *et seq.* of my book, grants this in the most complimentary way. Ours he declared to be "the only adequate safeguard which has hitherto been invented against unconstitutional legislation"—that is to say, in other words, legislation tending toward that usurping or blending of powers which was always found where the government held the man as victim.

Before Dicey wrote, the two greatest of British dependencies, Canada (1867) and Australia (1900), had paid the supreme tribute of framing constitutions very like our own, including the all-saving Judicial Department—which the unlearned and the vicious in our country today find so much to their disliking.

You ask me to show "one single feature" of our Constitution which was derived from Rome. I do not claim that any particular clause can be traced directly. My contention is for American derivation in the main. But from the Roman Republic we get the word veto and its use. Rome gave us the name of our Senate. A National government operating over many provinces or States, with local practices and interests left to local control, under which our Republic has become so great and happy, was first

tried successfully by Romans before the beginning of the Christian era. Walton points out (Introduction to Roman Law, p. 92) that the abuse of power by the two consuls elected by the centuries was prevented by the short tenure of office (one year) and the fact that each consul could block by his veto any official act of the other. The records of our Constitutional Convention are replete with arguments in favor of this short tenure of office. Throughout the Roman system the magistrates of equal rank could by veto check actions of their colleagues. How far our much-commended system of "checks and balances" was drawn from Rome I do not estimate.

In Herbert S. Hadley's illuminating "Rome and the World Today," written to recommend Roman methods to the bettering of present times, it is said (p. 349):

> Roman law . . . became the basis of the legal codes of half the world, and Rome's form of government influenced the organization of the republics and constitutional monarchies of Europe and America.

In a special message to Congress asking for relief to sufferers from earthquake, President Roosevelt spoke of "the debt which civilization owes to Italy." As Roosevelt's greatest ability was shown in the field of history, he doubtless had in mind achievements in law and government as well as in music, painting, sculpture, and the other arts.

My idea is that a historical booklet intended to introduce young people in school to our constitutional history should take the widest outlook upon the great governments of mankind. It should not strive to find in Saxon polity what is not clearly there—or what is clearly not there. Of the impossibility of drawing anything definite from Saxon times Bagehot, the ablest Englishman that has written on the subject, says in the last chapter of "The English Constitution" (p. 213):

> I cannot presume to speak of the time before the Conquest, and the exact nature even of all Anglo-Norman institutions is perhaps dubious; at least, in nearly all cases there have been many controversies. Political zeal, whether Whig or Tory, has wanted to find a model in the past; and the whole state of society being confused, the precedents altering with the caprice of men and the chance of events, ingenious advocacy has had a happy field.

The trial by jury, one of the four corner-stones which you laid, and which you trace to the Saxon, was to him probably unknown, according to Sergeant Stephen's Blackstone (Vol. 3, p. 588, note z); and Forsyth, a distinguished English scholar, in "Trial by Jury" (p. 45), goes farther and says that "it may be confidently asserted that trial by jury was unknown to our Anglo-Saxon ancestors."

You question my statement that Bryce said that the British really have no constitution. I quote from "Studies in History and Jurisprudence" (Vol. 1, p. 133):

> There is no British Constitution. That is to say, there are no laws which can be definitely marked off as fundamental laws, defining and distributing the powers of government, the mode of creating public authorities, the rights and immunities of the citizen.

"Defining and distributing powers"—that is what makes a constitution. When powers are not defined and distributed—and then held to the letter by a judiciary—there is no constitution.

Of course I show in my book, as you say, that the English colonists brought with them much of English law. They also rejected much. They brought some set and very practicable ideas of government. Many of the colonists were here because of government at home objectionable or intolerable to them. England is the source of a great deal of matter in our Constitution, some of which had been "glittering generalities" at home, but all of which became living actuality under our plan of government.

Magna Charta, the Petition of Right, and the Bill of Rights, which are the body of what is called the British Constitution, are limitations upon kingly or executive power dictated by an absolutely unrestrained legislative body, whereas the striking feature of our Constitution is that although it does not directly limit the Executive at all, it binds "down from mischief" not only the National legislature, but also the legislatures of all the States. Could two governments be more unlike at base?

"In questions of power, then," wrote Jefferson, "let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

That is the great American idea. There, in one sentence, we have the complete history of the world's failures in government. Whatever may have been *thought* in other lands, it was first *done* in the United States. The nations have been copying our method. The success of it in the Spanish and the Portuguese countries of South America, as well as in other countries, shows that the genius for government does not belong to one race. All races can do well when they bind down from mischief the man in power. That is what America taught the world to do. The world has been bettered so far as it has done it. Germany will do it now.

We not only do not derive any fundamental part of our constitutional system from Great Britain, but, on the other hand, the British Empire of self-governing colonies became possible under and is controlled today by principles first stated in the fourth paragraph of the American Declaration of Rights of 1774. That paragraph declares that Americans were "entitled to a free and exclusive power of legislation in their several provincial legislatures . . . in all cases of taxation and internal polity," subject to the veto of the sovereign. That states precisely the present governments of Canada, Australia, Ireland and other members of the British Empire. As the pen of John Adams gave the final touches to that paragraph, Professor McIllwain of Harvard, in a recent valuable work (The American Revolution, p. 122), says that Adams deserves to be named among the great men who were the "founders of the modern British Commonwealth of Nations."

Instead of striving to figure ourselves out as debtors to a cloud-land of antiquity, why not show forth to the young the facts of that American statesmanship which has modified the governments of the world and made all mankind our debtors?

Yours very truly,
T. J. NORTON.

The Great Out-Door Sport

"The taking of life has become almost a common-place. This represents a state of morals alarming to any one who considers the elements of civilized society. It is a condition which cannot be ignored safely and most certainly calls for a restoration rather than a further weakening of the safeguards civilization has had to create and maintain for the security of human life."—*Chicago Tribune.*

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in Current Legal Periodicals

Among Recent Books

LEGAL Foundations of Capitalism, by John R. Commons. New York: The Macmillan Company, 1924, $3.00.—The author announces in his preface that "the aim of this volume is to work out an evolutionary and behavioristic, or rather volitional, theory of value." This aim will doubtless seem rather contradictory in statement to those behaviorists who regard the volitional as excluded from consideration, but the language of the declared aim must be understood in the light of the discussion of the author. Throughout the work the author uses the "will-in-action" as synonymous with behavior. The declared aim of the author has been accomplished, but the by-products of his effort are perhaps more significant than the accomplishment of the avowed aim. To the writing of this book, the author brought a life-long accumulation of information in the fields of economics, psychology and philosophy. In addition, he has had a very considerable experience in legal matters, consisting of a careful study of legal history and court decisions and the drafting of bills for the Legislature of Wisconsin. The result of this combined experience and knowledge is a valuable demonstration of the utility of behavioristic psychology and of the very great identity of problem in the subject matter of law, philosophy and economics.

Throughout the book, the author stresses the significance of the conduct of individuals. Thus, on pages 81 and 82, we find the following: "Thus the dualism of spirit and matter, the trinity of intellect, feeling and will, the potencies of John Locke and the courts, are resolved into the valuation of one's own behavior. Metaphysically, or philosophically, the dualism remains, because there are two orders of phenomena, the psychological and the physical, whose connections we do not understand. But scientifically we deal with each one in its own field, for science is superficial. It deals only with behavior, which is the surface of things. It is not fundamental, for it knows not the essence of things, nor how one order of phenomena gets into another order of phenomena. It may push the unknown back a bit, but it always leaves a field of the unconscious and unknown, a field of hypothesis and guessing, where the conscious goes underground into physiology, biology, physics and chemistry. We do not know *what* the soul is, nor what substance is. We do not even know ourselves as we really are until we act. We only know ourselves truly as we analyze ourselves acting.

"Each act is an action and a reaction with external nature, or a transaction with persons, and as such, is a moving point, a flow of performance, avoidance, forbearance, playing its little part towards realizing the whole that lies in the future. . . .

"For purposes of science, therefore, it does not matter whether we know or do not know what the substance of the will is. Science deals with probabilities and superficialities. Whether we hold to 'determinism' or 'indeterminism' does not matter for economic purposes. The 'determinist' cannot tell what a business man, a working man or a judge on the bench is going to do the next minute any more than the 'indeterminist,' notwithstanding his superior confidence that behavior is determined or predetermined. Each, if he is wise, follows the approved procedure of knowing his man by knowing how he has acted in the past, and figuring out the probabilities of how he will act in the present and future."

While it may be urged that the author diverges from "behaviorism" pure and simple, in recognizing the possibility of something other than that which he designates the "superficial," it is nevertheless true that his entire discussion concerns itself only with the manifested conduct of human beings toward each other and hence utilizes the values of behaviorism without incurring any of the possible disadvantages of that system of thought. Thus, in the early part of the first chapter, we find this extremely comprehensive paragraph:

"Transactions have become the meeting place of economics, physics, psychology, ethics, jurisprudence and politics. A single transaction is a unit of observation which involves explicitly all of them for it is several human wills, choosing alternatives, overcoming resistance, proportioning natural and human resources, led on by promises or warnings of utility, sympathy, duty or their opposites, enlarged, restrained or exposed by officials of government or of business concerns or labor unions, who interpret and enforce the citizen's rights, duties and liberties, such that individual behavior is fitted or misfitted to the collective behavior of nations, politics, business, labor, the family and other collective movements, in a world of limited resources and mechanical forces."

He further points out that the method of approach of the law courts has for centuries been behavoristic.

"While the economists start with a commodity or an individual's feelings towards it, the court starts with a transaction. Its ultimate unit of investigation is not an individual, but two or more individuals—plaintiff and defendant—at two ends of one or more transactions. Commodities and feelings are, indeed, implied in all transactions, yet they are but the preliminaries, the accompaniments, or the effects of transactions. The transaction is two or more wills giving, taking, persuading, coercing, defrauding, commanding, obeying, competing, governing, in a world of scarcity, mechanism and rules of conduct. The court deals with the will-in-action."

Since every transaction may be examined simultaneously from the standpoint of the relation of

its constituent elements to each other—which is economics—from the standpoint of the extent to which its occurrence is compelled, permitted, assisted or hindered as to each participant therein—which is law—and from the standpoint of the social effect thereof—which is ethics, the subject matter of these three sciences is an identical series of transactions and any examination of such transactions, to be most helpful, must recognize the likelihood of close interrelations between the results obtained by viewing this identical subject matter from different angles of approach. The analysis of the author is most helpful in bringing out and emphasizing the interrelation and the interdependence of these fields.

As an illustration of this interrelation and interdependence, the reader is referred to the author's consideration of the influence of economic changes upon the concepts of "property" and "liberty." On page 6, the author states: "These changes from mechanism to scarcity and thence to working rules as the underlying principles of economics have had a profound effect upon the concept of property, changing that concept from a principle of exclusive holding of physical objects for the owner's private use, into a principle of control of limited resources needed by others for their use and thus into a concept of intangible and incorporeal property arising solely out of rules of law controlling transactions. The change was gradually accomplished in American jurisprudence between the years 1872 and 1897, and consisted in changing the definitions, by the Supreme Court, of the terms 'property,' 'liberty' and 'due process of law,' as found in the Fourteenth Amendment to the Constitution."

One of the most valuable and fascinating parts of the book is that which immediately follows the above quotation, in which the author traces the evolution of the concepts of property and liberty. In these few pages, he shows from the decisions of the United States Supreme Court that, while "property" in 1872 as protected by the Federal Constitution meant merely physical things held exclusively for one's own use, it had been expanded eighteen years later so as to include all exchange-value which, according to the author, is not corporeal but is behavioristic. The evolution of the concept, "liberty," took seven years longer, but by 1897 that concept, limited in 1872 to freedom from physical coercion, had been expanded by the court to cover freedom from economic coercion. The changes were justified and accounted for by changed economic conditions. As Professor Commons picturesquely puts it on page 53, "Just as the scales of the reptile become the feathers of the bird when the environment moves from land to air, so exclusive *holding for self* becomes *withholding from others* when the environment moves from production to marketing."

The book as a whole consists of two parts; the first six chapters are very largely analytic; the last four chapters are a recapitulation of economic history since the Norman Conquest and a partial exposition of present conditions in the light of the preceding analysis.

Analytical writers have usually found themselves faced with one of two difficulties: either pre-existing words must be used with newly defined exactness or new words must be coined in which to clothe the differentiations made. Hohfeld and Commons have chosen the former alternative. One who has endeavored to understand the vocabulary of Kocourek might well feel that the former alternative is the wiser, but the utilization of words which have acquired well defined meanings in new senses has an undesirable result. Many paragraps of a book thus written will seem mere word-mobs unless read in the context of the *whole* book. This difficulty is present in Commons' book. It is perhaps inevitable, but the message of the book would find much wider understanding if it were absent.

It is always difficult for a man who has lived so long in his subject, as the author has, to realize the difficulties experienced by ordinary folk in following his exposition. Our only wish is that the author, in addition to publishing another volume such as he mentions in his preface, may find time to write a book which will be nearer to the plane of the average intelligent reader. This book is an unusually good, but advanced, book in a language for which, unfortunately, no primers exist.

RICHARD R. ROWELL.
Columbia University School of Law.

The Transportation Act 1920, by Rogers Mac Veagh, New York: Holt & Co., Pp. xxvii. 968. $10.00.—The purpose of this book, as announced by the publishers, is to provide a practicable medium through which those interested may study the Transportation Act 1920 and ascertain its meaning, and to this end to give sufficient explanatory matter regarding questions of interpretation and to furnish suggestions for further intensive study. It must be conceded that the book is well fitted to accomplish this purpose to the full. Thus, it is wholly a source book of pertinent material and not itself a commentary on this material. The method of arrangement is to group below each section of the act the items bearing on it. These items are of the widest variety and indicate the care used by Mr. Mac Veagh. They include a brief historical sketch of the question involved, full titles of such acts as may be referred to in the section, reprints of (or references to) speeches in Congress on the subject, conference committee reports, Interstate Commerce Committee hearings and rulings as well as forms prescribed by that body, etc. Occasional items of great length, or pertinent to a number of sections alike, are placed in a voluminous appendix. Thus, this last contains in full the forms of contracts used by the U. S. Railway Administration in dealing with carriers. Special attention has been given to the section providing for the recapture of excess earnings, although the matter on the constitutionality of the innovation has, of course, decreased in importance since the recent decision upholding it.

Legal Philology, by F. C. Mulinix. St. Louis: Thomas Law Book Co. Pp. 344. $5.00.—Under this rather misleading title have been gathered together various excerpts and epigrams from the opinions of Henry Lamm, formerly Justice of the Supreme Court of Missouri. These have afforded rich matter in which to quarry, and many quaint and striking specimens have been produced, the most important of which, naturally, is the famous Missouri Mule Case. Of course, such a book will not lend itself to sustained reading—is there anything else so tiresome to read through as a really humorous joke book?—but an occasional glance at it in the proper mood will usually find something

worth while, as well as many items which, to be frank, might as well have been left out.

Our Constitution, by A. J. Cloud. Chicago: Scott, Foresman & Co. Pp. 224. $0.80.—Here is an elementary text meant mainly for the use of children in the upper grades, but serviceable also in adult Americanization classes. It opens with a brief statement of the reason why some sort of government is a necessity and of the situation confronting our nation when the Constitution was drawn. The bulk of the little book is taken up with a section by section exposition of the text of the Constitution. At the conclusion of each chapter are questions which the child should ask itself, or to which it should seek out the answer. It is frequently admonished to "ask your father" about this, that or the other point, some of them rather searching. One has an amused suspicion that many a perplexed parent will hope for suitable vengeance on Mr. Cloud—and incidentally undertake some protective researches of his own.

E. W. PUTTKAMMER.

STATE AND LOCAL BAR ASSOCIATION NOTES

THE Wisconsin State Bar Association held its annual meeting on June 26-7-8 at the City of Appleton, which is the home of Lawrence College. Headquarters were established on the porch of the Elks Club House, and most of the meetings were held in the Club House, which was centrally located and afforded excellent accommodations. Approximately three hundred members and their wives were in attendance during some part of the three days' session. This means that fully twenty-five per cent of our members attended the convention, which is a very high percentage for a bar association meeting.

The first session, aside from reports of committees and the usual routine of business, was devoted to "Problems of the Young Lawyer." The following subjects for discussion served to attract many of the younger members of the Bar: "How may the young lawyer set a value on his work which will be fair to the client and to himself?" "What methods may a young lawyer properly use to increase his clientele?" "How should the trial brief be prepared and what should it contain?" These subjects were ably and interestingly handled by Attorneys Geo. Williams of Oshkosh, Geo. M. Sheldon of Tomahawk, A. W. Kopp of Platteville and A. L. Hougen of Manitowoc.

The subject of President Hayes' address was "The Foundations of Public Confidence in Bench and Bar." Mr. Hayes set forth what he deemed to be the reasons for the existing lack of confidence in the legal profession and the courts, and made many valuable suggestions as to how this situation can be remedied. He laid strong emphasis upon the necessity of keeping the election of judges out of politics. It is Mr. Hayes' belief that so long as the Bar remains well trained, upright, and fearless, and the Bench continues able, incorruptible and courageous, the lives and liberties of the people will remain secure and equality of opportunity in the various pursuits of life will continue open to all; also that the Bar should be a strong organization and that its purposes should be more clearly defined; that an organized bar will soon become an efficient, trusted, and respected bar.

The report of the Special Committee on "Organization of the Bar" was read by its Chairman, Mr. Edwin S. Mack of Milwaukee. Upon Mr. Mack's recommendation the Association adopted an amendment to the constitution which will permit local bar associations to affiliate with the State Bar Association upon the payment of $3.00 for each of its members in good standing. Other amendments were also adopted which will tend to make the State Association a stronger organization and which will strengthen the relations between it and the local associations.

In the afternoon the Association took up the consideration of the general subject, "The Duty of the Bar in the Administration of the Criminal Law." "Guideposts for the Prosecution in Criminal Cases" was the subject of a paper by H. A. Sawyer of Milwaukee, which was followed by a discussion by Mr. George Shaughnessy, District Attorney of Milwaukee County. The corresponding subject, "Guideposts for the Defense in Criminal Cases," was ably treated by Attorney W. H. Bennett of Milwaukee. An unusually interesting feature of this part of the program was an illustrated talk by Prof. J. H. Matthews, director of the course in chemistry at the University of Wisconsin, upon the use of scientific methods in the detection of crime. His address showed in a striking way the very important part science in general, and chemistry in particular, are taking in the detection and proof of crime.

On Friday evening at the Congregational Church, Hon. Karl von Lewinski, Counselor of the German Embassy, Washington, D. C., and representative of the German Republic before the Mixed Claims Court at Washington, entertained a large audience with an address upon the subject "Administration of Justice in the Courts of Germany."

On Saturday forenoon the general subject was, "The Duty of the Bar in the Administration of Justice in Civil Cases." A paper was read by ex-Senator Roy P. Wilcox of Eau Claire upon "Simplifying the Organization of the Courts of the State." Theodore Brazeau of Wisconsin Rapids gave a paper upon "What May Be Done in Lessening the Time and Expense Involved in the Trial of Cases." This was followed by a discussion by J. G. Hardgrove of Milwaukee. Mr. Frank Boesel of Milwaukee gave a short report as Chairman of the Committee on Practice and Procedure. The Committee was not ready to report in full, it being Mr. Boesel's intention to attend the American Bar Association meeting in London, and while there make a further first-hand study of English methods. A full report of this committee may be expected at our next annual meeting.

Hon. William Draper Lewis, Director of the American Law Institute, Philadelphia, gave an exceedingly interesting outline of the work which the American Law Institute is endeavoring to accomplish in the restatement of the law. This paper was followed by a report of the Committee on the

Wisconsin Digest, Walter Drew, Chairman, Milwaukee, after which officers for the ensuing year were elected and business of the Association for the session was brought to a close.

Among other important business transacted, the Association authorized the Executive Committee to arrange for the publication and distribution of a journal or magazine, provided it can be financed out of the present revenues of the Association—such magazine to contain the annual reports of the Association and such other matters as the Association shall desire to place before its members.

The Committee on Legal Education reported favorably upon the recommendations of the Special Conference of American Bar Association Delegates, as to qualifications for admission to the Bar, and such recommendations were approved. If these recommendations are adopted by the Supreme Court, it will result in an important change in respect to the qualifications of candidates for the Bar and the method of their admission—whether by certificate from an accredited law school or by examination before the Board of Bar Examiners.

The banquet was held Saturday evening at the Conway Hotel, Hon. Albert M. Spencer being toastmaster. The banquet was well attended and was an unusually well-planned and enjoyable occasion. Other enjoyable social features were the luncheons for the members, their wives and guests, given at the beautiful Riverview Country Club, Friday noon; also the luncheon given at Guild Hall, Saturday noon. The members of the Appleton Bar cannot be too highly commended for the splendid manner in which they entertained the State Association.

While the papers and addresses delivered at the annual meeting constitute a most important work of the Association and should receive careful attention, yet it should not be forgotten that the actual condition of the Association is not shown by these, but rather by the condition of its membership and finances, and the activities of its committees. The greatly increased interest which the Bar as a whole is taking in the Association is indicated by the large attendance at the annual meeting and by the increase in membership, which was greater this year than ever before in the history of the Association. The Membership Committee reported the addition of over two hundred new members the past year, which is an increase of approximately 26 per cent. The treasurer's report showed, also, that the Association is in sound financial condition. The amount collected for dues was greater by more than one thousand dollars than the amount collected for dues during the preceding year. It is hoped that the Association will continue to grow in number and strength and will continue to exert a beneficent influence upon the welfare of the legal profession and of the State as a whole for many years to come.

The officers for the ensuing year are as follows:

President: Hon. Wm. D. Thompson, Racine.

Vice-Presidents: First Circuit, C. E. Randall, Kenosha; second, Henry Killilea, Milwaukee; third, George E. Williams, Oshkosh; fourth, E. R. Bowler, Sheboygan; fifth, L. A. Brunkhorst, Platteville; sixth, H. J. Masters, Sparta; seventh, T. W. Brazeau, Wisconsin Rapids; eighth, W. P. Knowles, River Falls; ninth, Byron H. Stebbins, Madison; tenth, F. S. Bradford, Appleton; eleventh, H. C. Wilson, Superior; twelfth, A. E. Matheson, Janesville; thirteenth, Henry B. Schmidt, West Bend; fourteenth, John A. Kittell, Green Bay; fifteenth, Allen T. Pray, Ashland; sixteenth, Fred J. Smith, Merrill; seventeenth, W. J. Rush, Neillsville; eighteenth, L. E. Lurvey, Fond du Lac; nineteenth, J. E. Pannier, Chippewa Falls; twentieth, Arthur J. Whitcomb, Oconto.

Secretary and Treasurer, Gilson G. Glasier, Madison; Assistant Secretary, Arthur A. McLeod, Madison; Chairmen of Standing Committees; Frank R. Bentley, Judicial, Madison; Francis E. McGovern, Amendment of Laws, Milwaukee; Archie McComb, Necrology, Green Bay; Joshua L. Johns, Membership, Appleton; H. S. Richards, Legal Education, Madison; Thos. S. Nolan, Publication, Janesville.

GILSON G. GLASIER, Sec.

THE BAR ASSOCIATION OF HAWAII had its annual meeting on Saturday, June 28, and, as for the past three years, at a country place on the beach at Mokuleia, thirty miles from Honolulu. The meeting was well attended, and unusual interest was aroused in the discussion of live questions, a considerable number of members participating. Present as a guest was Col. Frederick M. Brown, newly appointed judge advocate of the Hawaiian Department of the Army.

Officers elected were: President, Charles F. Clemons; vice-president, Alfred L. Castle; treasurer, E. White Sutton; secretary, J. Donovan Flint.

The leading paper, "Reminiscences of the Courts of Hawaii," by Hon. Sanford B. Dole, covered from the latter days of Chief Justice Lee in the "fifties" to the "eighties," a period of peculiar interest. Arthur Withington gave an address of unusual ability, "Is there Any Logic Left in the Law?" in which he deplored the present plethora of well-meant statutes, quite often based on some special individual grievance, but tending to impair the liberties of the people. He made his point good by citing two acts of the last Hawaii legislature, and took as his text Pollock's query, whether the Statute of Frauds has not caused more fraud than it has prevented.

A discussion of the movement of the Governor of Hawaii and of the Honolulu Chamber of Commerce, for reform of legal procedure, was led by Charles S. Davis; questions receiving especial attention being, the limits of the power of the police to detain persons for investigation, and a proposal to grant wider powers to grand juries of the Territory.

CHARLES CLEMONS, President.

THE NEW JERSEY STATE BAR ASSOCIATION held a meeting in Atlantic City on June 6, 1924. The following officers were elected: President, W. Holt Apgar, Trenton; first vice-president, Albert C. Wall, Jersey City; second vice-president, William T. Read, Camden; third vice-president, Michael Dunn, Paterson; secretary, LeRoy W. Loder, Bridgeton; treasurer, Lewis Starr, Camden.

The principal address was delivered by Hon. Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, on "Pending Attacks on Power of Courts to Review Constitutionality of Legislation." Mr. Maximilian T. Rosenberg of Jersey City, retiring president, delivered an address

on "Revisions Needed in the Statutes and in the Common Law." LEROY W. LODER, Sec.

THE DENVER (COL.) BAR ASSOCIATION has elected the following officers for 1924-25: Stanley T. Wallbank, president; Kenneth W. Robinson, first vice-president; W. W. Grant, Jr., second vice-president; Jacob V. Schaetzel, secretary-treasurer. The Association has adopted the plan of issuing well-gotten-up certificates of membership, and the officials believe it will have a good effect in increasing interest and expediting the collection of dues. The report of Mr. Hugh McLean, the retiring president, shows that the past fiscal year has been one of much activity. The establishment of the monthly "Record," creation of a temporary legal aid bureau in the secretary's office, holding of a Bar primary and various serious and social functions are mentioned in the report.

THE WYOMING STATE BAR ASSOCIATION held its annual meeting at Thermopolis, Wyoming, June 16-17. The attendance was very fair, there being in all about 40 members present. The business meetings of the Association were held in the Liberty Club, which was very kindly placed at our disposal. At noon on the 16th a luncheon was tion to all visiting members. At the conclusion of the luncheon a number of short talks were made and a very pleasant time had.

On the evening of the 16th at the Woods Hotel a very splendid banquet was given, at which not only the members of the Association, but the wives of the members and other ladies were present. At the conclusion of this banquet a number of talks were made by different members, and these were followed by a very able address by Mr. N. H. Loomis, General Solicitor of the Law Department of the Union Pacific Railroad Company, of Omaha, on the subject, "Eternal Vigilance Is the Price of Liberty." Mr. N. H. Loomis, at the conclusion of his main address, gave a further interesting account from old shorthand notes taken by him, of narratives made by Judge Usher on his recollections of Abraham Lincoln. Judge Usher was Secretary of the Interior under President Lincoln.

This meeting was noted for the attendance of our first woman lawyer, Miss Grace McDonald of Casper, who is now practicing in that city. Among the business transactions was the adoption of an amendment to the By-laws increasing the dues from $3 to $5 per annum, with no entrance fee. The newly elected officers are as follows: President, D. A. Preston, Rock Springs; first vice-president, J. B. Barnes, Jr., Casper; second vice-president, W. C. Mentzer, Cheyenne; secretary-treasurer, C. M. Watts, Cheyenne.

The next meeting will likely be held in Cheyenne in January, 1925. CLYDE M. WATTS, Sec.

THE MISSOURI STATE BAR ASSOCIATION will hold its next annual meeting at Joplin, Mo., on Oct. 3 and 4

REVIEW OF RECENT SUPREME COURT DECISIONS

(Continued from page 642)

therefore, did not acquire jurisdiction over the controversy in summary proceedings. Nor did it otherwise.

The case was argued by Mr. Elkan Turk for the judgment creditor, and by Mr. David W. Kahn for the trustees.

Bankruptcy—Compositions

The benefit of a composition extends to creditors who are named in the schedule but who fail to prove their claims within one year.

Nassau Smelting and Refining Works, Ltd., v. Brightwood Bronze Foundry Co., Adv. Ops. 591, Sup. Ct. Rep. 506.

In November, 1920, the Foundry Company was adjudged a bankrupt. In February, 1921, it made an offer of composition. In that month it also filed its schedule of debts; this included its debt to the Refining Works. Thirteen months later the offer of composition was accepted, and the court issued an order requiring the bankrupt to deposit sums sufcient to pay only claims seasonably proved. The Refining Works had failed to presents its claim for proof during these thirteen months. Barred from the benefit of the composition by the order of the court, it filed a petition to revise under Section 24b. The order was affirmed by the Circuit Court of Appeals for the First Circuit, but, on certiorari, judgment was reversed by the Supreme Court.

Mr. Justice Brandeis delivered the opinion of the Court. After pointing out that a composition binds creditors with scheduled claims, although they do not prove, he considered section 57n, which provides that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," and then said:

> There is no provision in the Act which declares in terms, that the offer extends only to those who prove their claims. Why should proof, within the year, of the existence of the debt be required where, by including the claim in the schedule, it had been admitted by the bankrupt? Obviously Section 57n does not operate to exclude any creditor from the benefits of the composition, where the offer is made before there is an adjudication.

Moreover, he said, most compositions are effected within the year. In distributions of a bankrupt estate each creditor is interested in limiting the claims paid, but in the case of a composition

> Neither the amount which a creditor receives nor the time when he receives it, can be affected by the amount of others' claims, or by the time of proof, or by their failure to prove. The rights of each creditor are fixed by the terms of the debtor's offer, subject only to its confirmation and the judge's order of distribution. Nor can the time of proof of claims, as distinguished from their allowance, be of legitimate interest to the bankrupt. His rights, also, are fixed by the offer, unless where the legality or the amount of a claim is questioned. No reason is suggested why Congress should have wished to bar creditors from participation in the benefits of a composition merely because their claims were not proved within a year of the adjudication.

The case was argued by Mr. Joseph B. Jacob for the creditor, and by Mr. Harry M. Ehrlich for the bankrupt.

Bankruptcy—Equitable Liens

Claimants rescinding a transaction for fraud cannot trace their money into a fluctuating fund of the wrongdoer where that fund is composed of money taken from hundreds of victims; the fiction of Knatchbull v. Hallett held inapplicable.

Cunningham et al. v. *Brown*, Adv. Ops. 496, Sup. Ct. Rep. 424.

The remarkable career of Charles Ponzi is still remembered, and one legal problem arising from his financial collapse finds its solution in this decision, handed down four years after that career ended. When reports of an investigation caused a run on his bank account by creditors who took advantage of his offer to pay in full any of his famous 150 per cent notes which had run forty-five days and all unmatured notes for the amount originally paid in, Ponzi concentrated all available funds in the Hanover Trust Company of Boston. The six defendants had loaned Ponzi sums of money between July 20th and July 24th. At the close of business on July 24th there was enough in the account to pay defendants' claims. But in the following sixteen days a constant stream of claimants and a frequent replenishing by Ponzi from other banks caused three million dollars to be deposited and withdrawn. On August 9th an overdraft finally ended the run, and the petition in bankruptcy was then filed.

These six creditors were among those who got their money. They did not file claims in bankruptcy, and when the trustees in bankruptcy brought these suits in equity to recover the sums paid them as unlawful preferences, they defended successfully on the ground that they had rescinded their contracts of loan for fraud, and that their individual deposits were still in the bank because a wrongdoing trustee is presumed first to withdraw his own money from the mixed fund. The District Court and the Circuit Court of Appeals for the First Circuit sustained this contention. But on certiorari the decrees for defendants were reversed by the Supreme Court.

The CHIEF JUSTICE delivered the opinion of the Court. He was of the opinion that defendants had not rescinded for fraud, but were merely taking advantage of Ponzi's offer to pay the notes. Furthermore, the public notoriety attending Ponzi's financial condition gave defendant's reasonable cause to believe he was insolvent. It was plain defendants came to the bank to seek a preference. But the learned Chief Justice held that even if defendants did rescind for fraud, they could not recover their money because they could not trace it. He said:

> It is clear that all the money deposited by these defendants was withdrawn from deposit some days before they applied for and received payment of their unmatured notes. It is true that by the payment into the account of money coming from other banks and directly from other dupes the bank account as such was prevented from being exhausted; but it is impossible to trace into the Hanover deposit of Ponzi after August 1st, from which defendants' checks were paid, the money which they paid him into that account before July 26th. There was, therefore, no money coming from them upon which a constructive trust, or equitable lien could be fastentd.

Regarding *Knatchbull* v. *Hallett*, L. R. 13 Ch. D. 696, holding that in the fluctuations of a fund composed partly of a defrauded claimant's money and partly of that of the wrongdoer, it would be presumed that the wrongdoer intended to draw out first money which he could legally use rather than that of the claimants, he said:

> To make the rule applicable here we must infer that in the deposit and withdrawal of more than three millions of dollars between the deposits of the defendants prior to July 28th, and the payment of their checks after August 2nd, Ponzi kept the money of defendants on deposit intact and paid out only his subsequent deposits. Considering the fact that all this money was the result of fraud upon all his dupes, it would be running the fiction of *Knatchbull* v. *Hallett* into the ground to apply it here. The rule is useful to work out equity between a wrongdoer and a victim; but when the fund with which the wrongdoer is dealing is wholly made up of the fruits of the frauds perpetrated against a myriad of victims, the case is different. To say that as between equally innocent victims, the wrongdoer having defeasible title to the whole fund, must be presumed to have distinguished in advance between the money of those who were about to rescind and those who were not, would be carrying the fiction to a fantastic conclusion.

The case was argued by Mr. Edward F. McClemen for the trustees and by Messrs. Louis Goldberg and John H. Devine for the respondents.

In *Liberty National Bank of Roanoke, Va.* v. *Bear*, Adv. Ops. 564, Sup. Ct. Rep. 499, it was held that to invalidate a lien obtained by a creditor through a judgment recovered within four months of the filing of a petition in bankruptcy, it must be proved that the debtor was insolvent at the time of the judgment. The trustee filed objections to the allowance of certain preferred claims alleging that as the judgment on which the preference rested had been recovered within four months prior to the filing of the petition in bankruptcy, it could not be enforced as a lien upon the bankrupt's estate. But he neither alleged nor proved that the bankrupt was insolvent at the time that the judgment was recovered, and, pointing out that Section 67f, annulling liens obtained within four months, applies only with regard to a person "who is insolvent," Mr. Justice Sanford reversed the judgment of the Circuit Court of Appeals for the Fourth Circuit. In the lower courts the decision had turned upon the question whether the adjudication of the bankruptcy of a partnership involves an adjudication of the bankruptcy of the individual partners, but the Supreme Court did not pass upon this question.

In *Meek* v. *Centre County Banking Co. et al.*, Adv. Ops. 396, Sup. Ct. Rep. 366, one Shugert petitioned to have his partnership and his copartners adjudged bankrupt. The partners resisted the petition as to themselves and the partnership. Shugert then died. The Court held that Section 8 of the Bankruptcy Act, providing that the death of a bankrupt shall not abate the proceeding, applied only to the voluntary aspect of Shugert's petition, that is, as to himself alone. As to the other partners, and the partnership, said Mr. Justice Sanford, it was an antagonistic proceeding, and Shugert stood in a position analogous to that of a petitioning creditor. The Court denied the motion to dismiss with leave to any representative of Shugert's estate to appear within thirty days, that the question whether the proceeding should be dismissed as to the partnership might be determined.

Patents

The right to a patent for the Woodbridge invention forfeited by designed delay.

Samuel Homer Woodbridge, et al. v. *The United States*, Adv. Ops. 94, Sup. Ct. Rep. 45.

This case involved a claim of William E. Wood-

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bridge for compensation from the United States for use of the alleged invention relating to projectiles for rifled cannon for which a patent was ordered issued by the Government. The issues before the Court of Claims were, first, whether Woodbridge was the first and original inventor, and secondly, to what extent the United States had used the invention and the amount of compensation which was due in equity and justice therefor.

In February, 1852, Woodbridge filed an application for a patent for an invention which he described as consisting of "applying to a projectile to be fired from a rifled gun, a rifle ring or sabot, in the manner described for the purpose of giving to the projectile the rifle motion." Two claims were allowed.

Subsequent thereto Woodbridge wrote to the Patent Office requesting that the patient be filed in the secret archives of the Government for a period of one year. This was done under section 8 of the Act of July 4, 1836.

Nothing was subsequently done by Woodbridge for nine and one-half years.

In 1861 Woodbridge wrote to the Commissioner of Patents calling attention to his patent and stating that he had allowed it to remain in the secret archives of the Government because only lately had there been any immediate opportunity of rendering it pecuniarily available. At the same time Woodbridge asked that he be permitted to amend his specifications and claims and broaden them. The patent office replied that the length of time he had allowed his patent to slumber was a bar to the issue of the patent, and the application was rejected on the ground of abandonment.

On April 15, 1862, Woodbridge appealed to the Board of Examiners in Chief which affirmed the action of the Examiner in the same year. Nothing was done by Woodbridge until July 7, 1871, when he appealed to the Commissioner of Patents. Nothing was done by anyone until January, 1879, when on Woodbridge's application the case was heard and the Commissioner affirmed the decision by the subordinate tribunals that the facts amounted to abandonment. The Supreme Court of the District of Columbia affirmed the Commissioner in 1880.

The Court of Claims found that Woodbridge was the first inventor of the invention involved in the two allowed claims, and also found that the United States had not used the invention. The case went to the Supreme Court on appeal from the Court of Claims.

The opinion of the court is by Mr. Chief Justice Taft.

Referring to the purpose of the Constitution providing for patents the learned Chief Justice said:

> The purpose of the clause of the Constitution concerning patents is in terms to promote the progress of science and the useful arts and the plan adopted by Congress in exercise of the power has been to give one who makes a useful discovery or invention a monopoly in the making, use and vending of it for a limited number of years. . . . It was the legislative intention that the term should run from the date of the issue of the patent, and that at the end of that time, the public might derive from the full specifications required in the application accompanying the patent, knowledge sufficient to enable it freely to make and use the invention.

The purpose of giving the invention to the public after a limited period of time would be defeated if the inventor could deliberately and without excuse postpone beyond the date of the actual invention, the beginning of the term of his monopoly, and thus the free public enjoyment of the useful invention would be put off.

The applicant for the patent thus delayed allowing the patent to issue for nearly ten years until the opening of the Civil War thus postponing the time when the public could freely enjoy it.

Referring to the motive of the applicant the learned Chief Justice said:

> This is not a case of abandonment. It is a case of forfeiting the right to a patent by designed delay.

He regarded *Kendall* v. *Winsor*, 21 How. 322, 329, controlling where the court held that an inventor may confer gratuitously the benefits of his ingenuity upon the public, with expressed declaration or by conduct acquiesce with full knowledge of the use of his inventions by others, or he may forfeit his rights as an inventor by a wilful and negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others.

This doctrine applies to the facts in the instant case where the applicant after a delay of nine and one-half years applied for a change of specifications and claims so that he might cover the patents of these subsequent inventors.

The decision is based not on a finding that the applicant intended to abandon his invention, but on a deliberate and unlawful purpose to postpone the term of the patent.

The case was argued by Mr. Henry P. Doolittle for the inventor, and by Mr. Harry E. Knight for the Government.

The London Meeting

"Because of its pleasurable influences the mind turns first to the social view. That may be best portrayed by the simple assertion that a great people, counting the perfection of conventions and civilization through the centuries, were at their best as hosts, if one may imagine a cultured Englishman as having another side to his social demeanor. Impressively intermingled with the exquisite hospitality of modernity was the formal stateliness and gorgeous grandeur of the ages. History, known only upon the rigid type of the printed page, or in the rich imagination of the reader under the stimulation of fulsome description, suddenly stepped forth in living energy. Learned men stood forth astonished and even awed at this happy mingling of antiquity and modernity, carefully staged by a thoughtful host, for the entertainment and education of the American lawyers."—*Central Law Journal.*

The Coca-Cola Company of Atlanta, Georgia, has prepared a volume in which are collected the opinions in cases in which it claimed that its trade name was infringed or in which there was a claim of other but similar, unfair competition. In addition it contains in many instances the text of the resulting decree, order or injunction, etc. Other matter included and otherwise inconvenient of access for most readers consists of unreported proceedings in subordinate courts, and opinions of the Examiner of Interferences of the U. S. Patent Office. The book is not offered for sale, but is presented by the Coca-Cola Company to such persons as it (by its attorneys) regards as probably interested.